Supreme Court, U. S.
FILED
JUL 12 1979
MICHAEL RODAK, JR., CLERK

79-54

IN THE

Supreme Court of the United States

October Term, 1979
No. .....

CITY OF LOS ANGELES, *et al.*, *Petitioners,*

vs.

FANCHON BLAKE, *et al.*, *Respondents.*

CITY OF LOS ANGELES, *et al.*, *Petitioners,*

vs.

UNITED STATES, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BURT PINES,
City Attorney,

JOHN B. RICE,
Senior Assistant City Attorney,

NEIL CARLTON BAKER,
Deputy City Attorney,
1800 City Hall East,
200 North Main Street,
Los Angeles, Calif. 90012,
(213) 485-6380,

CECIL WILLIAM MARR,
523 West 6th Street, Suite 719,
Los Angeles, Calif. 90014,
(213) 626-0125,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Opinions Below 2

Jurisdiction 3

Questions Presented 3

Constitutional and Statutory Provisions Involved 5

Statement of Case 5

A. The Use of Sex-Based Classifications Prior to July 1973 7

B. The Development of the Blake Case in District Court 8

C. The Government's Case in District Court and the Court of Appeals 12

D. The Court of Appeals Decision in Blake 14

Reasons for Granting the Writ 16

I

The Ninth Circuit's Rule That Law Enforcement Policies Must Be Changed Merely to Permit a Larger Percentage of Women to Be Hired Is a Threat to the Constitutional Doctrine of Federalism and Is Contrary to Title VII of the 1964 Civil Rights Act 16

II

The Ninth Circuit's Burden on an Employer Utilizing a Personnel Test Is Impossible to Meet, and Conflicts With Existing Law and Professional Standards 18

Page

A. The Circuit Court's Burden on an Employer Signals the Deathknell of This Action and Threatens Personnel Testing in This Circuit 19

B. The Ninth Circuit's Decision Conflicts With the State of the Law in This Court and in the Second, Fifth, Seventh, Eighth and Tenth Circuits 21

III

The Shifting of the Burden of Proof to a Governmental Employer Requires Clarification Because of Unresolved Questions of Constitutional and Title VII Interpretation 24

IV

The Circuit Court's Grant of Summary Judgment on Appeal on the Issue of the Former Use of "Policeman" and "Policewoman" Classifications Is Erroneous as a Matter of Law and Jeopardizes Good Faith Modifications of Personnel Systems by Employers 27

V

Standards for the Granting of a Preliminary Injunction Enjoining the Termination of Federal Funds Should Be Established by This Court .. 30

Conclusion 32

Appendix A. Opinion .....App. p. 1

Appendix B. Memorandum Opinion 38

Page

Appendix C. Opinion 62

Appendix D. Memorandum 69

Appendix E. Order Regarding Motion to Stay Proceedings and to Enjoin Fund Cutoffs 72

Appendix F. Pertinent Constitutional Provisions 74

Tenth Amendment 74

Fourteenth Amendment, Sections 1 and 5 74

Appendix G. Sections 703(a) and (h) of Title VII of the 1964 Civil Rights Act, as Amended 75

Appendix H. Sections 518(a), (b), (c)(1) and (c)(2)(E) of the Omnibus Crime Control and Safe Streets Act of 1968, as Amended 77

TABLE OF AUTHORITIES CITED

Cases — Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 22

Blake v. City of Los Angeles, 435 F.Supp. 55 .....2, 5, 6, 7, 8, 12, 14, 16, 18, 21, 22, 23, 26, 27, 30

Boyd v. Ozark Air Lines, Inc., 568 F.2d 50 (8th Cir. 1977) 23

Craig v. Boren, 429 U.S. 190 (1976) 28, 29

Dothard v. Rawlinson, 433 U.S. 321 (1977) 25, 26, 28

Firefighters Institute, Etc. v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977), certiorari denied, 434 U.S. 819 (1977) 20

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 16

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 25, 27

Hardy v. Stumpf, 21 Cal.3d 1 (1978) 24

Hazelwood School District v. United States, 433 U.S. 299 (1977) 26

Kelley v. Johnson, 425 U.S. 238 (1976) 17

Landis v. North American Co., 299 U.S. 248 (1936) 31

Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978) 25

National League of Cities v. Usery, 426 U.S. 833 (1976) 17, 26

New York City Transit Authority v. Beazer, ... U.S. ...., 99 S.Ct. 1355 (1979) 22

Page

Parham v. Hughes, ... U.S. ....., 99 S.Ct. 1742, 60 L.Ed. 2d 269 (1979) 29

Rizzo v. Goode, 423 U.S. 362 (1976) 18

Smith v. Olin Chemical Corp., 555 F.2d 1283 (5th Cir. 1977) 23

Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) 22, 23

Teamsters v. United States, 431 U.S. 324 (1977) .. 25

United States v. State of South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), affirmed, 434 U.S. 1026 (1978) 23

Vulcan Society of N.Y. City Fire Dept., Inc. v. Civil Service Commission, 490 F.2d 387 (2d Cir. 1973) 23

Washington v. Davis, 426 U.S. 229 (1976) 10, 22, 24, 26

Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977), certiorari denied, 435 U.S. 934 (1978) 23

Miscellaneous

BNA's Daily Labor Report, No. 121, pp. AA-2 et seq. (June 22, 1976) 21

Los Angeles Daily Journal Report No. 77-13 (Oct. 21, 1977), pp. 28-30 13

Milton, C., et al., Police Use of Deadly Force (Police Foundation, 1977), p. 10 17

Rose, D., "Memorandum for the Deputy Attorney General Re: Selection Guidelines" (Apr. 12, 1976) 21

Page

Sullivan, "LAPD Bias Suits Risk Millions", Los Angeles Herald Examiner (May 23, 1979), p. 1 21

Regulation

Code of Federal Regulations, Title 28, Sec. 1607 .. 19

Rules

Rules of the United States Supreme Court, Rule 23(5) 2

Statutes

Civil Rights Act of 1964, Sec. 703(a) 5

Civil Rights Acts of 1964, Sec. 703(h) 5

Civil Rights Act of 1964, Sec. 706(b) (42 U.S.C. §2000e-5(b)) 28

Civil Rights Act of 1964, Sec. 707(b) (42 U.S.C. §2000e-5(f)(5)) 32

Crime Control Act of 1976, Sec. 122(b) 12

Omnibus Crime Control and Safe Streets Act of 1968, Sec. 518(a) 5

Omnibus Crime Control and Safe Streets Act of 1968, Sec. 518(b) 5, 31

Omnibus Crime Control and Safe Streets Act of 1968, Sec. 518(c)(1) 5

Omnibus Crime Control and Safe Streets Act of 1968, Sec. 518(c)(2)(E) 5, 12, 31

United States Code, Title 31, Sec. 1242 6

United States Code, Title 28, Sec. 1343(3) 5

United States Code, Title 28, Sec. 1343(4) 5

Page

United States Code, Title 28, Sec. 1345 6

United States Code, Title 28, Sec. 1254(1) 3

United States Code, Title 42, Sec. 1983 5

United States Code, Title 42, Sec. 2000e 5

United States Code, Title 42, Sec. 2000e-6(b) 6

United States Code, Title 42, Sec. 3766(c)(2)(E) 12, 31

United States Code, Title 42, Sec. 3766(c)(3) 6

United States Constitution, Tenth Amendment 4, 5, 17, 26

United States Constitution, Fourteenth Amendment 4, 5, 14

United States Constitution, Fourteenth Amendment, Sec. 1 5

United States Constitution, Fourteenth Amendment, Sec. 5 5

Textbooks

Binkin, M. & Bach, S., Women and the Military (The Brookings Institution, 1977), pp. 80-81 30

Block & Anderson, Policewomen on Patrol, Final Report (Police Foundation, 1974), pp. 23, 24 17

IN THE

Supreme Court of the United States

October Term, 1979

No. .....

CITY OF LOS ANGELES, *et al.*, *Petitioners,*

vs.

FANCHON BLAKE, *et al.*, *Respondents.*

CITY OF LOS ANGELES, *et al.*, *Petitioners,*

vs.

UNITED STATES, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Petitioners, City of Los Angeles, *et al.*,[1] (hereinafter, "City"), respectfully pray that a Writ of Certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Ninth

---

[1]In addition to the City of Los Angeles, the Petitioners in *Blake* consist of all of the Defendants in the Court below, including the City of Los Angeles Board of Civil Service Commissioners, and the board members or former members named in the Amended Complaint (filed October 26, 1973): William I. Maltz, Arnett L. Hartsfield, Jr., Sue K. Young, and Dr. John C. Bollens. Additionally, the Petitioners include the City of Los Angeles Board of Pension Commissioners, and the board members or former members named in the Amended Complaint:

(This footnote is continued on next page)

Circuit entered in *Blake, et al.*[2] *v. City* and *United States v. City* on May 2, 1979. In filing a single petition pertaining to those two cases, the City is proceeding under Rule 23(5) of the Rules of the Supreme Court.

Opinions Below.

The opinion of the Court of Appeals in *Blake v. City of Los Angeles* is not yet officially reported, and it appears as Appendix A at pp. 1-37, *infra*. That decision has been unofficially reported at 19 FEP Cases 1441. The decision of the United States District Court for the Central District of California granting summary judgment to the City in *Blake* is reported at 435 F.Supp. 55, and is unofficially reported at 15 FEP Cases 76 and 14 EPD ¶7668. That decision is reprinted as Appendix B at pp. 38-61, *infra*.

The opinion of the Court of Appeals in *United States v. City of Los Angeles* is not yet officially

---

Leon Savitch, Jack Borman, Steven Gavin, Olga Marcus, Joel M. Winitz and Sam Bianitto. The Petitioners also include Edward M. Davis, formerly Chief of Police, Los Angeles Police Department.

In addition to the City of Los Angeles, the Petitioners in *United States v. City of Los Angeles* include the following individuals named in their official capacities and their successors in office: Muriel Morse (formerly General Manager, Civil Service); Irene Tovar, E. Thomas Fizzolio, Dr. John Bollens, Dr. Ruth Boak, and Arnett Hartsfield, Jr. (members or former members of the City of Los Angeles Board of Civil Service Commissioners); Samuel L. Williams, Marianna Pfaelzer, James Fisk, Salvador Montenegro and Stephen Reinhardt (members or former members of the City of Los Angeles Board of Police Commissioners) and Edward M. Davis (formerly Chief of Police, Los Angeles Police Department).

[2]In addition to Fanchon Blake, the Respondents in *Blake* include Michael Wendler, Leona Vess, Carol Stamey. Shirley Walton, once a named Plaintiff in the action below, was the subject of a voluntary dismissal on November 10, 1976.

reported, and it appears as Appendix C at pp. 62-68, *infra*. That decision has been unofficially reported at 19 FEP Cases 1455. The opinion and order of the District Court in that matter were unofficially reported at 16 FEP Cases 229 and 14 EPD ¶7785, and are reprinted at Appendix D and Appendix E, respectively, at pp. 69-71 & 72-73, *infra*.

Jurisdiction.

The judgments of the Court of Appeals for the Ninth Circuit were entered in both cases on May 2, 1979, and this Petition for Certiorari is being filed within 90 days of that date. This Court's jurisdiction is being envoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Does Title VII of the Civil Rights Act of 1964, as amended (hereinafter "Title VII"), require a local government to change the manner in which the job of police officer is performed (*i.e.*, providing for the use of greater force, such as a baton or nightstick, rather than for the more physically demanding hand control holds in effectuating an arrest) merely because those different policies would permit selection standards having less "adverse impact" upon women as a class, or does that Act and/or the constitutional concepts of federalism permit a local government to establish its law enforcement policies and to select the most qualified candidates to perform the tasks required by those policies?

2. Assuming a *prima facie* case of discrimination as to the height requirement (5'6") and the physical abilities test used in the selection of Los Angeles Police

Officers, does Title VII forbid the use of those selection standards unless the City submits formal validation research studies demonstrating that those standards are directly related to the business necessity, or may the City meet its burden of proof under some alternative standards, such as by submitting competent and relevant evidence that those standards are related to the job of Police Officer in Los Angeles?

3. Does Title VII shift the burden of proof against a municipal employer upon showing of "adverse impact" on a personnel test despite rebuttal evidence that such impact is not probative of purposeful discrimination, or is such an interpretation inconsistent with either Title VII or constitutional concepts of federalism and the Tenth Amendment?

4. Did the City's pre-July 1, 1973 maintenance of separate gender-based job classifications of "Policeman" (the classification that was assigned general patrol assignments) and "Policewoman" (the classification generally assigned to inside tasks including juvenile and administrative work) violate the equal protection clause of the Fourteenth Amendment to the United States Constitution?

5. Was the continued use of gender-based police classifications during a transitional period between March 24, 1972 and July 1, 1973 justified under Title VII by the doctrine of business necessity?

6. In *United States v. City of Los Angeles,* did the District Court err as a matter of law when it issued a preliminary injunction to enjoin a termination of funds distributed by the Law Enforcement Assistance Administration (hereinafter "LEAA") to the Los Angeles Police Department, when that injunction was necessary to maintain the status quo during a stay of proceedings pending the resolution of *Blake,* and where the Government was prosecuting its case because of the City's failure to accept Justice Department mandated goals or quotas for the hiring of Blacks, Hispanics, and women?

Constitutional and Statutory Provisions Involved.

The Tenth Amendment and §§1 and 5 of the Fourteenth Amendment to the United States Constitution are set forth as Appendix F hereto, at p. 74, *infra.* Relevant provisions of Title VII of the Civil Rights Act of 1964, as amended (§§703(a) and (h)), and the Omnibus Crime Control and Safe Streets Act of 1968, as amended (§§518(a), (b), (c)(1) and (c)(2)(E)), are set forth as Appendix G (at pp. 75-76, *infra*) and Appendix H (at pp. 77-78, *infra*), respectively.

Statement of Case.

The cases described below arise from challenges to the personnel practices of the City of Los Angeles (hereinafter, "the City"), as those practices relate to sworn positions in the Los Angeles Police Department. In *Blake v. City of Los Angeles,* the jurisdiction of the District Court was claimed under 28 U.S.C. §§1343 (3) and (4). That action was brought under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e *et seq.* ("Title VII"); under 42 U.S.C. §1983; and under the Fourteenth Amendment of the United States Constitution.

The claims of the Plaintiffs in *Blake* (hereinafter, "Plaintiffs") involved three time periods: (1) The pe-

riod prior to the extension of Title VII to include governmental entities (March 24, 1972), when the City maintained "Policeman" and "Policewoman" classifications; (2) the period between the extension and the creation of the City's "Police Officer" classification (July 1973); and (3) the period subsequent to July 1973, when men and women competed on an equal basis for Police Officer jobs. As to the latter period, the Plaintiffs specifically complained of the City's height requirement (currently 5′6″) and its physical abilities test.

On May 13, 1977, the District Court granted the City's motion for summary judgment in *Blake*. Twenty days thereafter, *United States v. City of Los Angeles* was filed by the Attorney General pursuant to Title VII; the State and Local Fiscal Assistance Act of 1972, as amended (31 U.S.C. §1242); and the Omnibus Crime Control and Safe Streets Act of 1968, as amended (42 U.S.C. §3766(c)(3)). Jurisdiction was claimed under 31 U.S.C. §1242, 42 U.S.C. §2000e-6(b), 42 U.S.C. §3766(c)(3), and 28 U.S.C. §1345. In that suit, the Government sought to raise many of the same issues which had been decided in *Blake*. However, the District Court stayed the Government's action pending appeals in *Blake,* and issued a preliminary injunction to maintain the status quo during that stay. The Government appealed the issuance of that injunction.

The development of those two related cases, and the decisions of Circuit Court, are discussed chronologically in the following paragraphs.

A. The Use of Sex-Based Classifications Prior to July 1973.

Prior to 1973, as the District Court found,

> the City maintained the separate classifications of "Policemen" and "Policewomen". . . . Although Policemen and Policewomen were both sworn officers, they had different lines of promotion and different types of duties. Policemen were assigned to the more physical tasks, including work on patrol and in the field. Policewomen generally were assigned to specialized tasks and inside work. [App. B, at p. 40. See also App. A, at p. 2.]

The City's use of the "Policewoman" classification during that time period was similar to the policy in other United States cities. Beginning in 1971, there had been a limited movement in certain cities to place women in patrol positions. *Blake* Record (hereinafter, "B.R.") 2213-19. However, when the City implemented the "Police Officer" classification in 1973, most police departments still utilized women in a limited civil service classification. B.R. 2219-20.

On June 12, 1973, the City Council voted to create the general classification of "Police Officer". B.R. 2208. Thereafter, men and women candidates who became field certified Police Officers performed the job previously done by Policemen. B.R. 2187 & 2418. As the District Court found, "The uncontradicted affidavits filed by the defendants detail the activities of those in charge of formulating and implementing the reorganization of the Department", and "the time required to put the revised hiring practices into effect was not unreasonable under the circumstances." App. B, p. 47. Under the new system, an applicant was required to have a minimum height of 5′7″, but that

requirement was reduced 5'6" less than a year later. "An applicant was also required to pass a physical abilities examination designed to test physical endurance, strength, and agility."[3] App. B, p. 47.

B. The Development of the Blake Case in District Court.

In 1973, *Blake v. City of Los Angeles* was filed as a challenge to the various police personnel practices as those practices applied to women. The Plaintiffs challenged the pre-July 1973 use of "Policeman" and "Policewoman" classifications, and the City's selection standards for the post July 1973 classification of Police Officer.

Regarding the Police Officer hiring standards, the Plaintiffs asserted that the adverse impact on women as a class of the City's height requirement and physical abilities test shifted the burden of proof, and required the City to "validate" those requirements. The District Court recognized that proportionately fewer women

[3]The District Court described that test as follows:

> This test consists of five events; each event is graded on the basis of 1-100, according to the candidate's performance. The combined score on all events must equal or exceed 350. These tests are:
>
> 1. Wall scale—run a total of 50 yards then scale a smooth wall 6 feet high. (17 seconds)
> 2. Maintain grip—run a total of 50 yards then take an overhand grip on a chinning bar and maintain grip for one minute. (16 seconds run plus 60 seconds on the bar)
> 3. Weight drag—run 50 feet then drag a dead weight of 140 pounds for 50 feet. (16 seconds)
> 4. Tremor test—run a total of 50 yards then hold a stylus steady for 17 seconds. (17 seconds run plus 100 points on the stylus)
> 5. Endurance run—run as many laps as possible in 12 minutes on a one-eighth mile track. (10 laps)
>
> (The performance in parenthesis is that which will yield the average passing score of 70 points per test.) [App. B, pp. 47-48.]

candidates pass both the height requirement and the physical abilities test. However, the Court found that "uncontradicted evidence" rebutted any inference of discrimination which might have required a shifting of the burden of proof to the City. App. B, p. 54. That evidence included facts pertaining to the different physical ability of males and females. See B.R. 2260 & 2291. See, also, n. 21, *infra*, at p. 29. The Court of Appeals also found no disputed material facts, but reversed the District Court as a matter of law, holding that "a showing of disproportionate impact is all that is required to establish a *prima facie* case of discrimination. . . ." App. A, p. 11.

In moving for summary judgment, the City submitted uncontradicted affidavits showing the relationship between the City's standards and various physical tasks performed by Police Officers. As part of that showing, the City submitted affidavits that relatively taller and stronger Police Officers are able to subdue resisting suspects with a lesser degree of force. B.R. 2306-08 & 2419.

Although the City disagreed that formal statistical validation studies were legally required, the City also contracted for the production of an extensive job analysis and two formal statistical validation studies which demonstrated (1) that officers who were 5'8" or 5'9" used strong force 31 percent more frequently than did officers who were six feet or taller (B.R. 1995 & 2009); (2) that, once an officer was forced by the level of the suspect's resistance to utilize a bar-arm control hold,[4] a taller officer was more likely

[4]The bar-arm control is applied by moving a resisting suspect so that the officer may apply pressure with his or her forearm

(This footnote is continued on next page)

to better perform that control hold against a moderately resisting suspect; and (3) that the City's physical abilities test was correlated significantly with simulations of police tasks including foot pursuits, field shooting, and emergency rescues.[5]

In addition, a study which had been prepared by an expert employed by the City demonstrated that four of the five events used in the physical abilities test were predictive of success in at least seven of the eleven measures of success in the police training academy. The fifth test event, the "tremor test", proved to be predictive of success in shooting, which is the behavior which that event was intended to predict. B.R. 2195.

In response to the City's evidence of statistical corroboration of the job-relatedness of height and the physical abilities test, the Plaintiffs submitted the affidavit of their expert, James J. Kirkpatrick, to attest to certain purported methodological deficiencies.[6] Dr. Kirkpatrick did not take the position that the City's requirements were not job-related (see B.R. 3603-04), nor did he state that the City's validation studies were not professionally acceptable. Additionally, the Plaintiffs submitted copies of certain City studies, and a number of depositions of individuals from other police

---

to the suspect's trachea. When properly applied, the hold causes unconsciousness by stopping the flow of oxygen to the brain. See B.R. 2076.

[5]Mahaffey Affidavit at pp. 5-6, and the attached Exhibit B. Those documents were forwarded to the Ninth Circuit as "non-reproducible" portions of the record.

[6]In 1970, Dr. Kirkpatrick submitted a similar affidavit in a case pertaining to the Washington Metropolitan Police Department. That document was printed in the Appendix, *Washington v. Davis*, Supreme Court No. 74-1492 at pp. 53-57.

agencies relating to performance of women officers who did not meet the City's physical standards.

The Plaintiffs' depositions demonsrated that other Police Departments have restructured their policies or their jobs to accommodate shorter and weaker Police Officers. For example, when the Washington Metropolitan Police Department reduced the height requirement from 5′7″ to 5′0″, it began teaching its neck-applied control hold (a bar-arm control hold) by having the simulated suspects in the training academy get on their knees so that officer being trained could properly apply the control hold.[7]

Other departments permit higher levels of force to be used against suspects. In New York City, in contrast to the Los Angeles Police Department policy of using minimum force, women police officers were taught "gouging the eyes, [and] groin kicks" to control suspects.[8] As one woman officer stated, "In other words, you don't really throw them but you have to kind of—I hate to use the term—'Finish them off'. . .."[9] In the Boston Police Department, if an officer cannot resolve a physical confrontation by talking to the suspect, he or she utilizes a police baton, rather than restraining the individual by wrestling or by a control hold.[10]

Based upon its review of the affidavits, depositions, and studies, the District Court found that the evidence

---

[7]Deposition of Robert Shupe (filed February 9, 1977) at page 54.

[8]Deposition of New York City Police Officer Lucille Burrascano (filed February 9, 1977) at page 79.

[9]*Id.*

[10]Deposition of Boston Police Commissioner Robert di Grazia (filed February 9, 1977) at pages 66-68.

presented no material issues of fact requiring a trial, and granted summary judgment to the City. App. B, p. 61.

C. The Government's Case in District Court and the Court of Appeals.

Following the District Court's decision, the Attorney General filed his complaint in *United States v. City of Los Angeles,* alleging sex, race, and national origin employment discrimination in the Los Angeles Police Department. As a result of that filing, federal funds administered by the Department of Justice's Law Enforcement Assistance Administration (hereinafter, "LEAA") and received by the Los Angeles Police Department would have been terminated by operation of law[11] on or about July 18, 1977. Prior to that date, the District Court stayed any further action in the Government's case pending the appeal of *Blake v. City of Los Angeles,* and enjoined the termination of LEAA funds to maintain the status quo during that stay. The Government appealed from that preliminary injunction.

The filing of *United States v. City* culminated a two year series of communications between the City and the Government by which the Government attempted to require the City to establish numerical goals or quotas for the employment of minorities and women as police officers. Record in *United States v. City* (hereinafter, "U.S. R.") 49-55 & 724-25. After the District Court stayed the Government's action, Assistant Attorney General Drew Days, III, of the Civil

[11]Those funds would have been terminated pursuant to §122 (b) of the Crime Control Act of 1976, amending §518(c)(2)(E) of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3766(c)(2)(E), *infra,* at pp. 77-78.

Rights Division, explained the filing of its action, stating, "Our suit against the Los Angeles police department was based in part on a referral from LEAA after it had failed to meet grant requirements to increase minority and female percentages."[12]

Following the filing of the Government's suit, the City obtained a preliminary injunction to ensure the continuity of certain programs receiving LEAA funding. In the absence of that injunction, the loss of LEAA funds would have resulted in the loss of funding for a program to break the network of violent juvenile gangs, primarily in minority communities. Federal funds received through LEAA had permitted the Los Angeles Police Department to divert 30 officers and 14 radio cars from regular functions to the suppression of gang-related crime, and preliminary figures indicated a 22 percent decrease in those crimes since a pilot program in 1976. U.S. R. 524-25 & 529.

If the City had lost that program, citizens in certain communities would have experienced a sharp increase in gang violence. U.S. R. 526-27. That eventuality was forestalled by the District Court's injunction. However, on May 2, 1979, the Court of Appeals reversed that injunction, reasoning that the District Court's order could not be justified by its desire to maintain the status quo during the pendency of a necessary stay of proceedings. See App. C, p. 68.

[12]U.S. Department of Justice, "Remarks of Drew S. Days, III, Assistant Attorney General, Civil Rights Division, Department of Justice, before the National Black Policemen's Association, New Orleans, Louisiana on August 25, 1977" at page 6. That official document was later republished by the *Los Angeles Daily Journal Report* No. 77-13 (October 21, 1977) at pages 28-30.

D. The Court of Appeals Decision in Blake.

In its companion decision, the Circuit Court reversed the District Court's summary judgment in *Blake*, and granted summary judgment to the Plaintiffs (who had not filed a formal motion for summary judgment) for two of the three challenged time periods. First, the Circuit Court held that "the gender-based classification system [*i.e.*, the use of "Policemen" and "Policewomen"] used by [the City] before Title VII became applicable to governmental agencies violated the equal protection clause of the Fourteenth Amendment"; and, second, that the City's "use of sex-segregated job classifications between March 24, 1972, and July 1, 1973, violated Title VII because it was not mandated by business necessity. . . ." App. A, p. 2.

Third, the Circuit Court remanded the portions relating to the lawfulness of the City's Police Officer personnel tests, and set forth the following legal standards which the District Court is to apply.

(a) *Prima Facie Case/Constitutional Issue*—In response to the District Court's holding that the 1972 amendments to Title VII (promulgated pursuant to the Fourteenth Amendment) could not have constitutionally extended the so-called "impact test" to local governmental entities, the Circuit Court held that statistics showing "disparate impact" will shift the burden in a case involving personnel testing, even in the absence of any showing that those statistics are probative of discrimination. App. A, p. 11.

(b) *Employer's Burden in a Testing Case*—Although the District Court had found the City's selection standards to be lawful because "competent and relevant evidence" demonstrated their "job relatedness",

the Circuit Court held that " '[j]ob relatedness' is relevant only for the purpose of trying to prove that the characteristics which the various tests select are directly related to the business necessity." App. A, p. 17. The Circuit Court then characterized the " 'business necessity' defense" as "very narrow", and held that the District Court's judgment must be reversed because the City's rational evidence and the three statistical validation studies had not demonstrated that the Police Officer standards were "so job related as to be justified by business necessity." App. A, p. 18. That Court rejected the City's formal validation studies, in part, because the City had not hired and trained Police Officers shorter than 5'6" to participate in those studies. App. A, p. 24.

(c) "*Search for Alternatives*" —To "avoid repetition of error" by the District Court, the Court found that "Title VII may indeed require modification of [law enforcement] policies" to eliminate the need for job related selection standards which have an adverse impact against any particular sex or racial group. App. A, p. 30.

REASONS FOR GRANTING THE WRIT.

In the following pages, the City discusses the reasons for granting the writ in the context of each of the major burdens in a Title VII case: the *prima facie* case, the employer's demonstration of the lawfulness of its testing procedures, and the plaintiff's showing of pretext or "alternatives". Because the rule of law established by the Circuit Court for a plaintiff's showing of alternatives is most devastating to the role of local law enforcement, the City considers those burdens in reverse order. Finally, the City considers the Circuit Court's grant of summary judgment on the issues involving the obsolete gender based classifications, and its reversal of the District Court's preliminary injunction.

I

The Ninth Circuit's Rule That Law Enforcement Policies Must Be Changed Merely to Permit a Larger Percentage of Women to Be Hired Is a Threat to the Constitutional Doctrine of Federalism and Is Contrary to Title VII of the 1964 Civil Rights Act.

In *Blake*, the Ninth Circuit established a new standard for evaluating the availability of "less discriminatory alternatives". As interpreted in *Blake*, Title VII requires the "modification of [law enforcement] policies", if such modification will enable the department to hire individuals with less physical ability. App. A, pp. 30-31. As a preliminary matter, that requirement conflicts with the reasoning of *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-78 (1978), in which this Court stated that Title VII "does not impose a duty to adopt a hiring procedure that maximizes the hiring of minority employees." *Id.*

More importantly, however, the Ninth Circuit's view that Title VII requires a police department to change

law enforcement policies which have been established by the community violates the concepts of federalism established in the United States Constitution including the Tenth Amendment. This Court has recognized that police protection is a function which state and local governments "are created to provide . . . ." *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976). Indeed, "[t]he promotion of safety of persons and property is unquestionably at the core of the State's police power . . . ." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

Unlike other police departments having lesser physical standards,[13] the Los Angeles Police Officer must "aggressively pursue the performance of his or her duty", but that duty "must be performed with a minimum use of force." B.R. 2419. See App. B, page 56. To require the City to modify the Police Officer job by reducing the arrest activity expected of an officer,[14] or by increasing level of force which may be utilized against a resisting suspect,[15] interferes with the "well-

---

[13]See page 11, *supra*.

[14]For example, Block & Anderson, *Policewomen on Patrol, Final Report* (Police Foundation, 1974) reported that, of a matched group of 86 women and 86 men hired by the Washington Metropolitan Police Department, the men's group (which averaged an inch and a half taller and 32 pounds heavier than the women's group) made approximately three times the number of felony arrests and more than twice the number of misdemeanor arrests made by the women's group. *Id.* at 23. The male group also issued more than twice the number of traffic citations. Id. at 24.

[15]Two of the "major findings" of a 1977 study by the Police Foundation are (1) that "[p]olice departments differ widely in their policies and review procedures relating to the use of deadly force . . ."; and (2) "rates of shootings by police officers vary widely among jurisdictions . . . ." C. Milton, et al., *Police Use of Deadly Force* (Police Foundation, 1977) at 10.

established rule that the government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs. . . .'" *Rizzo v. Goode,* 423 U.S. 362, 378-79 (1976). Thus, this Court is urged to grant the Writ to ensure that local police departments may continue to establish law enforcement policies on the basis of local needs and priorities, rather than to maximize the percentage of women employed as police officers.

II

The Ninth Circuit's Burden on an Employer Utilizing a Personnel Test Is Impossible to Meet, and Conflicts With Existing Law and Professional Standards.

In holding that the City had not met this burden of proving the lawfulness of its height requirement and physical abilities test, the Circuit Court in *Blake* adopted a standard of proof for employers which will be impossible to meet. That burden appears to signal the deathknell of this action and threatens the future of personnel testing in the Ninth Circuit.

The Court held that testing devices having adverse impact on any race or sex group must be shown to be "so closely job related that their use is 'necessary to safe and efficient job performance.'" App. A, pp. 19-20. The Circuit Court rejected the City's proof that the physical abilities test had been carefully constructed, that both the height requirement and the physical abilities test were rationally related to specific tasks of the job, and that both were consistent with the civil service merit system mandated by the Charter of the City of Los Angeles. That Court also rejected the City's two job analyses and three professional validation studies as demonstrating the lawfulness of the City's selection devices.

A. The Circuit Court's Burden on an Employer Signals the Deathknell of This Action and Threatens Personnel Testing in This Circuit.

In rejecting the City's extensive validation evidence, the Circuit Court created several insurmountable burdens on employers utilizing merit systems or personnel tests which have adverse impact on any group. For example, the Circuit Court held that formal research studies are the only evidence permitted to prove that a test is "directly related to the business necessity" (App. A, p. 17), and also requires, *inter alia,* that an employer must hire lesser qualified individuals to prove that the previously established standards are "necessary". See App. A, pp. 23-24.

According to the Circuit Court, Title VII requires that any mental or physical qualification having adverse impact on any race or sex group must be subjected to the ultimate validation research study—one which meets the EEOC guidelines (29 C.F.R. §1607 *et seq.*) or the "[much heavier] burden of justification" which an employer must meet if it does not comply with those guidelines. App. A, p. 21. Finally, if any lesser qualified individual hired for the purpose of research managed to do an acceptable job during the experiment mandated by the Circuit Court's decision, that single person's success presumably would mean that the employer's standard was not "necessary".

Although the issues of the City's selection standard were remanded for trial, the Circuit Court's legal standards appear to signal the deathknell of this action, and, if it remains the law, will limit or eliminate per-

sonnel testing in the Ninth Circuit. First, the Circuit Court's requirement that the City must hire, train, and use shorter and weaker Police Officers to prove the "necessity" of its standards is a practical and legal impossibility for a municipality; particularly when the only evidence before the City demonstrates that Police Officers who do not meet the City's standards would be more likely to use a higher degree of force against citizens and would be less likely to perform the tasks of the job. That requirement also outlaws the commonly accepted professional method of conducting validation "concurrently", or with existing employees. See B.R. 2015-16. *See, also, Firefighters Institute, Etc. v. City of St. Louis,* 549 F.2d 506, 510-11 (8th Cir. 1977) *certiorari denied,* 434 U.S. 819 (1977).

Second, the Circuit Court's insistence on a "necessity" standard for proving the lawfulness of a personnel test is at odds with the nature of testing itself. A personnel test never indicates a magic level which distinguishes candidates who can perform the job from those who cannot. Rather, a job related test "increases the *probability* that persons selected will perform well." B.R. 2017. Because exceptional individuals may perform a job after failing a test, it is generally impossible to prove that the use of a personnel test in an individual hiring decision is "necessary".

Third, the Circuit Court has elevated the technical provisions of the EEOC guidelines to legal standards which cannot be met by employers, and has ignored uncontradicted evidence that the application of such guidelines as absolute standards is professionally improper. B.R. 2012-13. The impropriety of such a use of those guidelines is corroborated by an internal Justice Department memorandum written by the long-time head

of the Civil Rights Division's Employment Section, David L. Rose. It states,

> [T]he thrust of the present guidelines is to place almost all test users in a posture of non-compliance; to give great discretion to enforcement personnel to determine who should be prosecuted; and to set aside objective selection procedures in favor of numerical hiring.[16]

Thus, *Blake, United States v. City,* and Mr. Rose's comments demonstrate that, even with expensive validation evidence,[17] an employer stands to lose federal funding, attorney fee awards, and enormous back pay awards[18] to broad classes of plaintiffs as the result of any litigation involving employment qualifications which have had any adverse impact against any racial or sex group.

B. The Ninth Circuit's Decision Conflicts With the State of the Law in This Court and in the Second, Fifth, Seventh, Eighth, and Tenth Circuits.

As noted earlier, the City submitted extensive validation studies in support of its motion for summary judgment, although it contended that such evidence was not legally required. The Circuit Court rejected that contention, and held that only one form of evi-

---

[16]D. Rose, "Memorandum for the Deputy Attorney General Re: Selection Guidelines" (April 12, 1976) (received in discovery (See U.S. R. 183-84) and previously published in BNA's *Daily Labor Report,* No. 121, pp. AA-2 et seq. (June 22, 1976).)

[17]The City's studies cost over $96,000 in consultants' fees, in addition to the cost of the personnel to participate in the various studies. See B.R. 4084.

[18]A Los Angeles newspaper has quoted a Plaintiffs' attorney as stating that the City "could owe $20 million in back pay for the women alone, and 'at least that much again' to minority candidates if the Justice Department wins its suit." Sullivan, "LAPD Bias Suits Risk Millions", Los Angeles *Herald Examiner* (May 23, 1979) at page 1.

dence, a validation research study, may prove the lawfulness of a personnel test. That holding conflicts with decisions of this Court and decisions of at least five other Circuits.

For example, last term the Supreme Court used the employment exclusion of individuals being treated with methadone as "job related" without any discussion of formal validation evidence. *New York City Transit Authority v. Beazer*, ... U.S. ...., 99 S.Ct. 1355, 1366 (1979). Earlier, in *Washington v. Davis*, 426 U.S. 229, 251 (1976), this Court held that the "much more sensible construction of the job-relatedness requirement" mandated the lawfulness of a written test which predicted performance in training, without any showing that such a written test was "necessary". *Id.* The *Blake* decision also appears to contravene *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 427 (1975) which stated that the "question of job relatedness must be viewed in the context of the plant's operation and the history of the testing program." *Id.*

In holding that an employer can meet its burden (after a prima facie case has been demonstrated) only by formal validation studies meeting certain legal standards, the Ninth Circuit is in a direct conflict with decisions of the Second, Fifth, Seventh, Eighth and Tenth Circuits. Courts in each of those circuits have approved the use of evidence probative of the job relatedness of a personnel standard, other than formal validation studies, to prove the lawfulness of the selection device.[19]

---

[19]See *Spurlock v. United Airlines, Inc.* 475 F.2d 216, 219 (10th Cir. 1972) ("[W]hen the job clearly requires a high degree of skill and the economic human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related"); *Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50, 54 (8th Cir. 1977) (adopting the *Spurlock* standard); *Vulcan Society of N.Y. City Fire Dept., Inc. v. Civil Service Commission*, 490 F.2d 387, 396 (2d Cir. 1973) (constitutional case treated under a Title VII standard in which the Court held that evidence of careful preparation of a personnel test would be relevant to a showing of job relatedness); *Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496 (7th Cir. 1977), certiorari denied, 435 U.S. 934 (1978) (no-spouse rule having adverse impact on women accepted as rationally related to job); and *Smith v. Olin Chemical Corp.*, 555 F.2d 1283 (5th Cir. 1977) (physical qualification having adverse impact on Blacks accepted as rationally related to job).

The legal standards used by the Circuit Court in evaluating the City's studies also present a direct conflict with a recent decision of a three judge panel, affirmed by the Supreme Court, which depended upon "professional standards" to evaluate an employer's validation evidence. *United States v. State of South Carolina*, 445 F.Supp. 1094 (D.S.C. 1977), *affirmed*, 434 U.S. 1026 (1978). That three judge panel accepted certain validation evidence despite the Plaintiff's argument pertaining to alleged methodological deficiencies, because that plaintiff (like the Plaintiffs in the instant case) had failed to prove any actual harm to the usefulness of the study as the result of those imagined deficiencies. *United States v. State of South Carolina, supra*, 445 F.Supp. at 1114. The *Blake* decision specifically rejected that balanced approach to an employer's burden, holding that it had been "amply refuted by existing case law." App. A, p. 25.

In addition to the direct conflicts discussed above, the Circuit Court's reasoning is also at variance with reasoning of other courts. Essentially, the Circuit Court rejects rational evidence of job relatedness as a matter of law, and insists that an employer "verify empirically"

facts which had been demonstrated by competent evidence. App. A, p. 22. That reasoning conflicts with the reasoning of this Court in *Washington v. Davis, supra,* 426 U.S. at 247 n. 13, and with the reasoning of the California Supreme Court in *Hardy v. Stumpf,* 21 Cal.3d 1, 9-11 (1978) (physical ability test for the Oakland Police Department upheld based upon rational evidence or "content validity"). Therefore, although the Ninth Circuit has remanded this case for further proceedings in the District Court, there will be great confusion as to the state of the law unless this Court grants the requested Writ to review the legal standards pertaining to an employer's burden in producing evidence of job relatedness.

III

The Shifting of the Burden of Proof to a Governmental Employer Requires Clarification Because of Unresolved Questions of Constitutional and Title VII Interpretation.

Another problem raised by the Circuit Court's decision is its holding that a finding of adverse impact relating to a selection device shifts the burden of proof to an employer, even when the employer's rebuttal evidence demonstrates that such adverse impact is not probative of intentional discrimination. App. A, p. 11. The District Court had rejected that "strict liability" approach and had refused to shift the burden of proof, because any inference of discrimination arising from the adverse impact of the City's height requirement and physical abilities test had been rebutted by the City's evidence that women were, as a class, relatively weaker and in poorer physical condition than men. App. B, p. 54.

In reversing the District Court, the Circuit Court interpreted *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) to require a shift in the burden of proof on a mere statistical showing regardless of whether those statistics are probative of intentional discrimination.[20] However, in *Griggs,* the statistics relied upon by the Court to shift the burden of proof were probative of purposeful discrimination, because there was no legitimate reason that Blacks and Caucasians should not be presumed to be equally qualified for a coal handler classification.

Moreover, this Court has never held that adverse impact shifts the burden of proof in the face of rebuttal evidence showing that such impact cannot give rise to an inference of intentional discrimination. Indeed, in *Teamsters v. United States,* 431 U.S. 324, 340 (1977) this Court provided that "like any other kind of evidence, [statistics] may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *Id.* Further, in *Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702, 710-11 n. 20 (1978), the Court recognized that

> Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences. [*Id.*] [Emphasis in original.]

---

[20]The Circuit Court based its interpretation on *Dothard v. Rawlinson,* 433 U.S. 321, 329 (1977). App. A, p. 11. In *Dothard,* however, the employer apparently offered no rational basis for the selection criteria being utilized, nor any statistical rebuttal to the plaintiff's prima facie case.

In *Blake,* however, the Ninth Circuit refused, as a matter of law, to permit rebuttal of a *prima facie* case where the plaintiff has submitted evidence of disproportionate impact of a selection instrument.

Where the employer is a state or local government entity, the Circuit Court's theory of strict liability for adverse impact against any racial or sex group appears to create a constitutional conflict. See App. B, pp. 50-52. After *National League of Cities v. Usery, supra,* 426 U.S. 833, it is apparent that Title VII was extended to governmental entities solely on the basis of the Fourteenth Amendment. As a result of *Washington v. Davis, supra,* 426 U.S. at 238-48, discrimination suits brought pursuant to constitutional claims require evidence of purposeful discrimination. However, if Congress, in extending Title VII to state and local governments, adopted the *prima facie* standard used by the Circuit Court, that extension conflicts with the Tenth Amendment.

This case provides an opportunity for this Court to clarify the standard for a *prima facie* case against a governmental entity. On two occasions during the last two years, the litigants before this Court have attempted to raise similar constitutional issues. See *Hazelwood School District v. United States,* 433 U.S. 299, 306 n. 12 (1977); *Dothard v. Rawlinson,* 433 U.S. 321, 323 n. 1 (1977). Clearly, there is national interest in resolving the constitutionality of a rule of law which provides for a shifting of burden of proof against a governmental entity on the basis of statistics which are not probative of intentional discrimination.

Thus, this Court should grant the Writ to clarify an employer's opportunity to rebut a *prima facie* case

when the statistics relate to a personnel test. Alternatively, the Court is urged to hold that the strict liability interpretation of *Griggs* may not constitutionally extend to governmental entities.

IV

The Circuit Court's Grant of Summary Judgment on Appeal on the Issue of the Former Use of "Policeman" and "Policewoman" Classifications Is Erroneous as a Matter of Law and Jeopardizes Good Faith Modifications of Personnel Systems by Employers.

The City also asks this Court to review the granting of summary judgment upon appeal (without a formal motion by the Plaintiffs) on the issues pertaining to the City's former use of the "Policeman" and "Policewoman" classifications. The Circuit Court reasoned that appropriate legal tests for equal protection (prior to the implementation of Title VII) or business necessity (after Title VII) could not be met because women could have served in a single general classification of "Police Officer" prior to the creation of the classification in July of 1973. See App. A, p. 35.

In its discussion of the District Court's use of the "business necessity" rationale to justify the transition period between the implementation of Title VII and the development of a single "Police Officer" classification, the Circuit Court reasoned that

> the very fact that the Department has successfully functioned since the dual classification system was abolished suggests that the old system was not required by compelling business purposes. [App. A, p. 15.]

Thus, under the Circuit Court's reasoning, an employer's voluntary change to a system which expands employment opportunity for individuals establishes as a matter of law that the earlier practice was unlawful. Such reasoning contradicts the principles of Title VII, which emphasizes the importance of conciliation and voluntary compliance by employers. See §706(b) of Title VII, 42 U.S.C. §2000e-5(b).

Further, the Circuit Court's summary judgment against the City's previous use of dual classifications of "Policeman" and "Policewoman" on an equal protection theory should be reviewed in light of this Court's application of Title VII in *Dothard v. Rawlinson, supra,* 433 U.S. 321. In that case, this Court applied Title VII's bona fide occupational qualification exception, a legal standard more stringent than that imposed by the Constitution, to justify gender based assignment of prison guards. In *Blake,* however, the Circuit Court applied the lesser constitutional burden to find that such classifications are unlawful unless there are virtually no alternatives (*i.e.,* "accurate proxies") to the gender based classification system. App. A, p. 35.

Thus, in granting summary judgment to the Plaintiffs, the Circuit Court failed to apply the appropriate constitutional standard as established in *Craig v. Boren,* 429 U.S. 190, 197 (1976). That case, relied upon by the District Court, held that gender based classifications serving important governmental objectives are constitutional if they are "substantially related to the achievement of those objectives." *Id.* The City clearly met that lesser burden, in light of its uncontradicted evidence

of the relationship of gender to physical size, strength, and agility needed to perform police tasks.[21]

During the past term, this Court opined that the principle underlying decisions such as the *Craig* case is "that a State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." *Parham v. Hughes,* ..... U.S. ....., 99 S.Ct. 1742, 60 L.Ed. 2d 269, 276 (1979). Applying that concept to this case, the dual police classifications cannot be said to have been an unconstitutional "administrative convenience".[22] Rather, those classifications were the result of the fact that men and women simply are not "similarly situated" with respect to the

---

[21]Indeed, the Plaintiffs' own evidence corroborated that submitted by the City. In the deposition of Dr. George Henry McGlynn (filed November 10, 1976), he testified to a number of physiological differences between the sexes. For example, women have more fatty tissue than men, and that increased mass of non-functional tissue means that men have "more energy in [their] muscle cells." *Id.* at 11. The additional body fat carried by a woman "acts as an additional hindrance . . . upon her cardiovascular system . . .," and is "the same as a male carrying around an extra 15 or 20 pounds." *Id.*

Further, women are at a "disadvantage . . . in activities requiring running" due to the female body structure (*id.* at 13), and have only "about two-thirds the maximum absolute strength than men do." *Id.* at 12. When compared to males, women have "poor upper body strength." *Id.* at 14. Women are "at a disadvantage as to vigorous activities" due to a "reduced lactic acid output", and have a "reduced oxygen carrying ability" caused by having "less hemoglobin per millimeter of blood." *Id.* at 12.

[22]The evidence before the Circuit Court also demonstrated that the dual classification system did not demean women. Policemen and Policewomen were always paid at the same rate. B.R. 2205-06. Although women did not have a promotional classification beyond "Policewoman Sergeant", there has been no significant difference in the retirement pensions between men and women. B.R. 2291-95.

ability to perform the physical rigors of police work in Los Angeles. See n. 21, *supra,* at p. 29. Further, because of those physiological differences, the City's continuation of the "Policeman" and "Policewoman" classifications for a transition period following the extension of Title VII to municipalities was reasonable,[23] and did not violate Title VII.

V

Standards for the Granting of a Preliminary Injunction Enjoining the Termination of Federal Funds Should Be Established by This Court.

Increasingly, employment discrimination cases against governmental entities involve the threat of termination of federal funds. In the instant case, a termination of LEAA funds was enjoined by this District Court after the City had submitted uncontradicted evidence that termination of federal funds would disrupt a program of juvenile gang control which primarily impacted minority communities. Because the Government's suit was filed a mere 20 days after the District Court's granting of summary judgment to the City in *Blake,* that court determined that a stay of the Government's action pending appeals in *Blake* was necessary so that the court could be guided by the ultimate resolution

[23]Had the City failed to properly prepare for the introduction of women to patrol duties, the result may not have been successful. For example, in the early 1970's, the military services assigned women to physically demanding jobs without developing specific physical standards. The General Accounting Office later reported that a large number of women had been assigned to jobs which they physically were not able to perform. M. Binkin & S. Bach, *Women and the Military* (The Brookings Institution, 1977) at 80-81.

of that case in its control of discovery in the Government's action. App. D, pp. 69-70. The preliminary injunction was necessary to maintain the City's gang control program during the pendency of the stay.

The preliminary injunction enjoining the termination of LEAA funds is authorized by §518(c)(2)(E) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended. See 42 U.S.C. §3766(c)(2)(E), *infra,* at pp. 77-78. Further, the injunction granted by the District Court was appropriate in light of that court's power to control its own calendar. See *Landis v. North American Co.,* 299 U.S. 248, 254 (1936). The Circuit Court, in reversing that preliminary injunction, has undermined the District Court's power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.*

The injunction also could have been justified on the basis of §518(b) of the Omnibus Crime Control and Safe Streets Act of 1968. That provision proscribes the conditioning of any LEAA grant on the adoption of a "percentage ratio, quota system, or other program to achieve racial balance". The affidavits submitted to the District Court, and the subsequent admission of Assistant Attorney General Drew Days, III, demonstrate that the Los Angeles Police Department was sued by the Justice Department because of its failure to adopt hiring goals or quotas for women and minorities. In the City's view, the District Court was obligated under the provisions of the Act to enjoin any termina-

tion of funds. The Circuit Court, however, rejected that argument. See App. C, pp. 64-66.

The Court is urged to review this issue to establish whether the Justice Department's practice of insisting upon racial goals or quotas, and threatening termination of federal funds if those quotas are not adopted, is consistent with the Omnibus Crime Control and Safe Streets Act of 1968. Further, to the extent that the Government actually files suits based on that statute, the statute should be interpreted to permit a District Court the authority to enjoin a fund termination when such a termination would be an unjustifiable hardship on a community, or when an injunction is required to maintain the status quo during a stay of proceedings.

Conclusion.

The decisions rendered by the Circuit Court in these cases are critical to local governments and law enforcement agencies throughout the country. The City urges this Court to grant the Writ to bring consistency to an area of law fraught with inconsistent interpretations; interpretations which have a direct impact on important governmental policies.

A hearing on the merits of this case also would have an important benefit to the litigants. This case was filed nearly six years ago, and a denial of the hearing by this Court probably will delay final resolution of the issues in this case by this Court for several years. On the other hand, the Court's granting of the Writ to resolve the important issues of law in this case would be consistent with the congressional policy to expedite Title VII cases. §707(b) of Title VII, 42 U.S.C. §2000e-5(f)(5).

For all the foregoing reasons, the City prays that a Writ of Certiorari issue to review the judgment and decisions of the United States Court of Appeals for the Ninth Circuit in these cases.

Respectfully submitted,

BURT PINES,
City Attorney,

JOHN B. RICE,
Senior Assistant City Attorney,

NEIL CARLTON BAKER,
Deputy City Attorney,

CECIL WILLIAM MARR,
Attorneys for Petitioners.

APPENDIX A.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

Fanchon Blake, et al., Plaintiffs-Appellants, v. City of Los Angeles, et al., Defendants-Appellees. No. 77-3595, No. 77-3601.

Appeal from the United States District Court for the Central District of California.

Filed: May 2, 1979.

Before: HUFSTEDLER and TANG, Circuit Judges, and SOLOMON,* District Judge.

HUFSTEDLER, Circuit Judge:

Appellants brought this class action charging the City of Los Angeles, the Los Angeles Board of Civil Service Commissioners, and Edward M. Davis, then Chief of Police of the Los Angeles Police Department, with sex discrimination in employment in the Los Angeles Police Department ("LAPD"). The appellants represent a class of women who are past, present, and future applicants for, employees in, and retirees from sworn positions in the LAPD. Appellants claimed violations of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*), the Fourteenth Amendment of the United States Constitution, and the Civil Rights Act of 1871 (42 U.S.C. § 1983). After certifying the class, the district court granted summary judgment to the appellees. Appellants appeal from the summary judgment, and the City cross-appeals from the class certification order.

---

*Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

We reverse the summary judgment and hold that (1) appellants met their burden of proving a prima facie case that the appellees violated Title VII before July 1, 1973, by maintaining sex-segregated job classifications, and after July 1, 1973, by using selection devices, including a height requirement and a physical abilities test that disproportionately excluded women from employment, (2) appellees' use of sex-segregated job classifications between March 24, 1972, and July 1, 1973, violated Title VII because it was not mandated by business necessity, (3) appellees were not entitled to summary judgment with respect to employment practices used after July 1, 1973, because they failed to show that the questioned employment practices were justified as a matter of law under the required standards for business necessity, (4) the gender-based classification system used by appellees before Title VII became applicable to governmental agencies violated the equal protection clause of the Fourteenth Amendment. Because we reverse and remand the case to the district court or trial, we decline to reach the merits of the class certification order.

FACTUAL BACKGROUND

Prior to July 1, 1973, the LAPD maintained separate, gender-based job classifications in entry-level police positions. Men in the "policeman" classification performed general police patrol assignments and could be promoted through all ranks of the department. Women in the "policewoman" classification generally performed "tasks relating to women and children, desk duty, and administration." Policewomen were barred from regular police patrol assignments and were ineligible for promotion above the level of sergeant. Between 1970 and

1973 no women were appointed to sworn positions in the LAPD, although the department hired more than 2,000 men. The percentage of women in sworn positions in the LAPD declined from 2.62 percent in 1970 to 2.15 percent in 1973.

Beginning on July 1, 1973, the LAPD abandoned the sex-segregated job classifications and established a single entry-level position of "police officer" for both men and women. The department unified its lines of promotion and imposed identical entry requirements on both male and female applicants for "police officer" positions, "Police officers" initially were required to be at least 5′ 7″ in height; this requirement subsequently was lowered to 5′ 6″ where it remains today. The department also instituted a physical abilities test, which all applicants for "police officer" positions were required to pass. In 1976, three years after the "unisex" job classification program had been established, women occupied only 2.08 percent of all sworn positions in the LAPD and only 0.48 percent of all positions in the ranks of sergeant and above.

The district court found that appellants' sex discrimination claims spanned three time periods of distinct legal significance. The first period antedated March 24, 1972, when Title VII became applicable to governmental agencies. The district court held that the dual classification system in effect during this period did not violate the equal protection clause of the Fourteenth Amendment because it was "substantially related to and serve[d] . . . the important governmental objective of providing an effective police force." (*Blake v. City of Los Angeles* (C.D. Cal. 1977) 435 F. Supp. 55, 61.

The second period was between March 24, 1972, and July 1, 1973, the date when the LAPD abolished the sex-segregated job classification system. The district court held that the dual classification system did not violate Title VII during this period because its continuation was justified by "business necessity". The dual classification system was found not to be a violation of the Fourteenth Amendment for reasons mentioned above.

The final period was the time after July 1, 1973, the date when the unisex "police officer" classification was instituted. The district court held that "undisputed facts" established that the entry requirements for police positions, including the height requirement and the physical abilities test, violated neither the Fourteenth Amendment nor Title VII. Appellants' Fourteenth Amendment claim was rejected because the district court found no evidence of discriminatory intent. The district court held that discriminatory intent also must be proved to establish a Title VII violation by an agency of local government. Thus appellants' Title VII claim was rejected, although the district court concluded that the LAPD's height requirement and physical abilities test "imposed a severe adverse impact upon women," (*Blake v. City of Los Angeles, supra,* 435 F. Supp. 55, 62.) The district court held, alternatively, that no Title VII violation could be shown even under the impact standard of *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, because the height requirement and physical abilities test "are appropriate for the selection of qualified applicants" as a matter of law. (*Blake v. City of Los Angeles, supra,* 435 F. Supp. at 66.)

I

TITLE VII CLAIMS

Appellants contended that the LAPD violated Title VII before July 1, 1973, by maintaining sex-segregated job classifications, and after July 1, 1973, by using selection devices, including a height requirement and physical abilities test, that disproportionately exclude women from employment.[1] A three-part inquiry is required to decide whether Title VII has been violated. (*Dothard v. Rawlinson* (1977) 433 U.S. 321, 329; *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425; *DeLaurier v. San Diego Unified School District* (9th Cir. 1978) 558 F.2d 674, 676.) The first question is whether plaintiffs have established a prima facie case of employment discrimination. (*Dothard v. Rawlinson, supra,* 433 U.S. at 329.) If a *prima facie* case has been shown, the burden then shifts to the employer to justify the employment practice in question. (*Griggs v. Duke Power Co., supra,* 401 U.S. at 432.) If the employer meets his burden of justification, plaintiffs may then show that alternative selection devices exist that would serve the employer's legitimate interests without discriminatory effects. (*Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 425.)

---

[1]Title VII provides in pertinent part: "(a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." (42 U.S.C. § 2000e-2(a).)

Prima Facie Case of Discrimination

Although the district court recognized that, under *Griggs v. Duke Power Co., supra,* a prima facie Title VII violation can be established by "the mere showing of a disproportionate impact" of an employment practice on a group protected by Title VII (*Blake v. City of Los Angeles, supra,* 435 F. Supp. at 63), the court held that the *Griggs* impact standard could not constitutionally be applied to agencies of state and local government. Relying on *Scott v. City of Anniston* (N.D. Ala. 1977) 430 F. Supp. 508, the district court reasoned that Congress had no constitutional power to impose on state and local governments anti-discrimination standards greater than those compelled by the equal protection clause of the Fourteenth Amendment. Because the Supreme Court in *Washington v. Davis* (1976) 426 U.S. 229, held that proof of discriminatory purpose was needed to establish a violation of the equal protection clause, the same standard must be engrafted on Title VII in actions against state and local governments. The premise of the argument is that "it is simple logic that a statute can be no broader than its Constitutional base." (430 F. Supp. at 515.) The premise is wrong because it misconceives controlling authority interpreting both the Fourteenth Amendment and Title VII.

In *Katzenbach v. Morgan* (1966) 384 U.S. 641, the Supreme Court held that Congress' power under Section 5 of the Fourteenth Amendment to enforce that amendment by "appropriate legislation" is not limited to prohibiting state action that itself violates the Constitution. *Katzenbach* upheld the constitutionality of Section 4(e) of the Voting Rights Act of 1965, prohibiting certain uses of a literacy test to determine

voter qualifications. Although the Supreme Court previously held that use of literacy tests to determine voter qualification did not violate the Fourteenth Amendment (*Lassiter v. Northampton County Board of Elections* (1959) 360 U.S. 45), *Katzenbach* held that Congress could determine that legislation banning use of literacy tests was "appropriate" to enforce the Fourteenth Amendment. In upholding congressional determinations of the efficacy of imposing bans on the use of such tests to implement the Fourteenth Amendment, the Supreme Court observed that "[i]t is enough that we may be able to perceive a basis" for the legislation. (384 U.S. at 653.)

The 1972 amendments extending the coverage of Title VII to state and local governments were enacted by Congress pursuant to Section 5 of the Fourteenth Amendment.[2] (*Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 453 & n.9.) In enacting this legislation, Congress clearly intended to apply the *Griggs* "impact" standard to state and local governments. As the Supreme Court said in *Dothard v. Rawlinson* (1977) 433 U.S. 321, 332 n.14: "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike. See H.R. Rep. No. 92-238, p. 17 (1971); S. Rep. No. 92-415, p. 10 (1971)." In reviewing the constitutionality of Congress' extension of the *Griggs* impact standard to state and local governments, we need only consider whether the 1972 amendments to Title VII were "appropriate legislation" to enforce the equal protection clause of the Fourteenth Amendment. (*Katzenbach v. Morgan, su-*

---

[2]Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

pra, 384 U.S. at 651.) The 1972 amendments are appropriate legislation to enforce the equal protection clause if they are " 'plainly adapted to that end' and . . . not prohibited by but . . . consistent with 'the letter and spirit of the constitution.' " (*Katzenbach v. Morgan, supra,* 384 U.S. at 651 (*quoting McCulloch v. Maryland* (1819 4 Wheat. 316,421).)

Congress enacted the 1972 amendments to Title VII after taking notice of findings "that widespread discrimination against minorities exists in State and local government employment." (H.R. Rep. 92-238, 1972 U.S. Code Cong. & Ad. News 2137, 2152.) It was plainly within Congress' authority to determine that implementation of the equal protection clause required extension of the *Griggs* impact standard to state and local governments. (*See Katzenbach v. Morgan, supra,* 384 U.S. at 653.) The means chosen by Congress are rationally related to the goal of enforcing the equal protection clause's prohibition of discrimination. The 1972 amendments are consistent with the letter and spirit of the Constitution. Because Congress acted pursuant to Section 5 of the Fourteenth Amendment, the Tenth Amendment does not foreclose application of the *Griggs* impact standard to state and local governments (*cf. Fitzpatrick v. Bitzer, supra* (Eleventh Amendment does not bar congressional provision for awards of backpay and attorneys' fees in Title VII actions against state)), regardless of any limitations it may impose on Congress' Commerce Clause powers (*see National League of Cities v. Usery* (1976) 426 U.S. 833).

We agree with the Seventh Circuit that "since the 1972 Amendments are clearly rationally related to and consistent with 'the letter and spirit' of the Fourteenth

Amendment, and the means chosen were not in themselves unconstitutional, . . . Congress could constitutionally incorporate the *Griggs* test into the 1972 Amendments." (*United States v. City of Chicago* (7th Cir. 1978) 573 F.2d 416, 423-24.) We therefore hold that Title VII applies the *Griggs* impact standard to both public and private employers alike, as numerous courts have recognized. (*United States v. City of Chicago, supra; United States v. Virginia* (E.D. Va. 1978) 454 F. Supp. 1077, 1084, *overruling Friend v. Leidinger* (E.D. Va. 1977) 446 F. Supp. 361, 384-87; *Harrington v. Vandalia-Butler Board of Education* (S.D. Ohio 1976) 418 F. Supp. 603, 607; *see also United States v. City of Buffalo* (W.D. N.Y. 1978) 457 F. Supp. 612; *League of United Latin American Citizens v. City of Santa Ana* (C.D. Cal. 1976) 410 F. Supp. 873; *Officers for Justice v. Civil Service Commission of San Francisco* (N.D. Cal. 1975) 395 F. Supp. 378.) The district court erred in holding that appellants were required to present evidence of discriminatory intent to defeat the City's motion for summary judgment.

The district court concluded that even if the *Griggs* impact standard was applied, appellees would still be entitled to summary judgment. This conclusion was based in part on the district court's holdings that continuation of gender-based job classifications and use of the physical abilities test and height requirement were justified by "business necessity" (issues we discuss *infra*). But the district court also concluded that appellants' evidence about the impact of the post-1973 selection standards would be insufficient to establish a prima facie case of sex discrimination even under the *Griggs* standard.

The City does not claim that appellants failed to show a prima facie case of discrimination under the *Griggs* standard for the gender-based job classifications in effect before July 1, 1973. The district court recognized that appellees "do not claim that the dual classification system for Policemen and Policewomen in effect during this period would comply with the requirements of Title VII." (*Blake v. City of Los Angeles, supra,* 435 F. Supp. at 61.) The undisputed total exclusion of women from regular police patrol work and positions above the level of sergeant unmistakably established a prima facie case of sex discrimination. Thus, the burden shifted to appellees to justify use of these practices after March 24, 1972.[3]

The undisputed evidence revealed that the 5′ 6″ height requirement excluded 87 percent of all women, but only 20 percent of all men between the ages of 18 and 79. The 5′ 7″ requirement excluded 95 percent of all women, but only 32 percent of all men. (*See also* Note, "Height Standards in Police Employment and the Question of Sex Discrimination," 47 S.Cal. L.Rev. 585, 588 n.13.) The physical abilities test excluded half of all women who took it, but only 2.6 percent of all men who took the test. Although the district court recognized that the height requirement and the physical test had a severe adverse impact on women (435 F. Supp. at 62), it nevertheless concluded that appellants had failed to show a prima facie case of discrimination arising from the use of either or both of these qualifications.

---

[3]The question whether defendants met their burden of justification with respect to the gender-based job classification is discussed at pp. 12-14, *infra.*

Despite the court's recognition that most disparities of this kind based upon statistical comparisons "often give rise to an inference of racial discrimination," the court concluded that "the same inference does not necessarily follow when a claim of sexual discrimination is asserted." The district court did not explain why gross disparities established through statistical comparisons are probative of racial discrimination, but not similarly probative of sexual discrimination. However, the district court did not have the benefit of *Dothard v. Rawlinson* (1977) 433 U.S. 321, which reached the opposite conclusion. *Dothard,* decided six weeks after *Blake,* held that a prima facie case of sex discrimination was established from national census statistics showing that a 5′ 2″ height requirement disproportionately excluded women from positions as Alabama Correctional Counselors. *Dothard* leaves no doubt that a showing of disproportionate impact is all that is required to establish a prima facie case of discrimination whether it be racial or sexual discrimination. "[T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." (433 U.S. at 329.) No inference of discriminatory purpose need be drawn for the statistics to establish prima facie discrimination, because discriminatory intent need not be shown in Title VII actions. (*United States v. City of Chicago, supra,* 573 F.2d 416.)

The conclusion follows that appellants established a prima facie case of sex discrimination by establishing a disproportionate impact by statistical methods indistinguishable from those in *Dothard.* Thus, the burden shifted to appellees to justify use of the challenged

selection devices. (*See, e.g., United States v. City of Buffalo* (W.D. N.Y. 1978) 457 F. Supp. 612, 622, 625 (disproportionate impact of written test and height requirements establishes prima facie case of discrimination); *Officers for Justice, supra,* 395 F. Supp. 378, 380, 382 (disproportionate impact of height requirement and physical test established prima facie case of discrimination).)

Appellees argued that the disproportionate exclusion of women was not as bad as it looked from the statistics because fewer women than men were interested in police work. The contention is not relevant. The challenged qualifications disproportionately excluded women who were interested enough to apply. Moreover, even if appellees had proved that women were less interested than men in police work, which they did not, the disinterest itself may be traceable to the Police Department's use of selection devices that would disproportionately exclude women. As the Supreme Court observed in *Dothard*: "The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." (433 U.S. at 330.)[4]

[4]*See* Note, "Height Standards in Police Employment and the Question of Sex Discrimination," 47 S.Cal. L.Rev. 585, 598-99 (1974). Nothing this court said in United States v. Ironworkers Local 86 (9th Cir. 1971) 443 F.2d 544, supports appellees' notion that plaintiffs are required to go beyond a showing of disproportionate impact to establish a prima facie violation of Title VII. Our statement that the use of statistics "is conditioned by the existence of proper supportive facts" meant only that statistics should be used properly and should not be used to make inferences they do not support. Appellants here properly used statistics to establish the disproportionate impact of appellees' selection devices. They did not need to make any greater showing to establish a prima facie case of sex discrimination. As we stated in *Ironworkers:* "It is our belief that the often-cited aphorism, 'statistics often tell much and Courts listen,' has particular application in Title VII cases." (443 F.2d at 551 [footnote omitted].)

The fact that there are physical differences between males and females, including the fact that men, as a group, tend to be taller and physically stronger than women as a group, does not erode the prima facie inference of discrimination that flows from a showing of statistically disproportionate impact. "Similarly, the statistical disparity here between male and female performance on the physical agility test establishes the *prima facie* case of sex discrimination, with the burden shifting to the defendants to show that the selection device is job related. If defendants establish the court's satisfaction that the upper body strength which the test primarily measures is necessary to patrol work, they will prevail, not because the plaintiffs have not established the *prima facie* case, but because the necessity for proper job performance of the skills measured by the selection device permits use of the device despite its adverse impact. Defendants' argument errs in that it takes as given the precise fact that the law requires defendants to prove." (*Officers for Justice, supra,* 395 F. Supp. at 382 n.1.)

"Business Necessity" Defense

Because undisputed evidence before the district court established a prima facie case of sex discrimination, the burden shifted to defendants to show that "business necessity" justified their employment practices. (*'Griggs, supra,* 401 U.S. at 431.) As the *Dothard* Court explained: "[o]nce it is thus shown that the employment standards are discriminatory in effect, the employer

must meet 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.' *Griggs v. Duke Power Co., supra,* at 432." (*Dothard, supra,* 433 U.S. at 329.) Administrative convenience is not a sufficient justification for the employer's practices. Rather, "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." (*Dothard, supra,* 433 U.S. at 332 n. 14; *DeLaurier v. San Diego Unified School Dist.* (9th Cir. 1978) 588 F.2d 674, 678.)

Until July 1, 1973, the LAPD maintained sex-segregated job classifications that barred all women from police patrol work and prohibited women from being promoted above the level of sergeant. The district court recognized, and appellees conceded, that the dual classifications system did not comply with the requirements of Title VII. Yet the district court, citing *Robinson v. Lorillard Corp.* (4th Cir. 1971) 444 F.2d 791, held that continuation of the practice was justified by "business necessity." The district court reasoned that "the City made a good faith effort to comply with the Act, and that the time required to put the revised hiring practices into effect was not unreasonable under the circumstances." (*Blake, supra,* 435 F. Supp. at 61-62.)

The district court misapprehended the impact of *Robinson v. Lorillard Corp., supra,* 444 F.2d 798. The *Robinson* court had held that "[t]he test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override

any racial impact, the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." (444 F.2d 79, 798 [footnotes omitted].) There was no evidence before the district court that the use of sex-segregated job classifications was necessary to the safe and efficient operation of the Los Angeles Police Department; moreover, there was abundant evidence that less discriminatory alternatives were available. Indeed, the very fact that the Department has successfully functioned since the dual classification system was abolished suggests that the old system was not required by compelling business purposes. (*Cf. Schick v. Bronstein* (S.D. N.Y. 1978) 447 F. Supp. 333 (height requirement does not serve an important governmental objective as department acknowledged by abolishing it); *Schaefer v. Tannian* (E.D. Mich. 1974) 394 F. Supp. 1128, *remanded on other grounds* (6th Cir. 1976) 538 F.2d 1234 (former practice restricting women to positions in Women's Division does not meet "business necessity" test).) No changed circumstances have been suggested that would justify the former prohibition of police patrol assignments for women in light of their subsequent successful performance on patrol. Thus, the LAPD's use of the dual classification system cannot be justified on the grounds of business necessity.

The district court attempted to justify a continuation of the dual classification system after March 24, 1972, on the ground that continuation of the discriminatory system was necessary to maintain a functioning police department during the transition period. The district

court's conclusion was based upon its prior erroneous conclusion that the earlier segregative system was justified on business necessity grounds and on the further assumption that a grace period should be implied similar to that accorded private employers when Title VII was first enacted in 1964. The inference properly to be drawn by Congress' express grant of a one-year grace period to private employers in 1964, and an omission to grant a similar grace period when public employers were added to Title VII in 1972, is that Congress deliberately withheld any grace period. The legislative history of the 1972 amendments to Title VII enforces our conclusion. "Legislation to implement this aspect of the Fourteenth Amendment is long overdue." (H. Rep. 92-238, 1972 U.S. Code Cong. & Ad. News 2137, 2154.) Nothing in the history suggests that Congress intended to permit public employers to delay compliance because immediate compliance with the law would be administratively inconvenient.

We conclude that the LAPD's use of sex-segregated job classifications prior to July 1, 1973, violated Title VII. Appellees completely failed to carry their burden of proving a business necessity to justify the Department's discriminatory system maintained in violation of Title VII.

We turn to the selection devices used by LAPD after July 1, 1973. Despite their exclusionary impact on women, the appellees sought to justify the Department's height requirement and physical abilities test as "job-related" measures of qualities important to successful performance of police tasks. The district court accepted the appellees' contentions and held that "[t]he undisputed facts before this court are such that the

court must conclude as a matter of law that the qualifying tests are appropriate for the selection of qualified applicants for the job in question." (435 F. Supp. at 66.) Accordingly, the district court granted summary judgment to the appellees despite the proved exclusionary impact on women of these qualifications in the period after July 1, 1973.

The district court's conclusions appear to be, once again, based upon a misunderstanding of the "business necessity" defense and of the relation of the concept of "job relatedness" to the business necessity defense. "Job relatedness" is relevant only for the purpose of trying to prove that the characteristics which the various tests select are directly related to the business necessity. The term "job related" generally is used to refer to the capacity of selection devices to measure traits that are important to successful job performance. The process of determining whether a selection device is sufficiently job related to comply with the requirements of Title VII has been referred to as "validation." It is not enough that the device selects characteristics that may have some rational relationship to job performance; "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." (*Dothard, supra,* 433 U.S. at 332, n. 14.)

Because the "business necessity" defense is very narrow, it is not easy for employers to demonstrate the job relatedness of selection devices shown to be prima facie violations of Title VII. (*See Albemarle, supra,* 422 U.S. at 425-36.) An employer who tries to show job relatedness as a matter of law on a motion for summary judgment faces an even greater challenge.

Summary judgment, of course, is appropriate only if the evidence before the district court shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Fed. R. Civ. P., Rule 56(c).) All of the intendments are against the party who is moving for summary judgment. (*Adickes v. Kress & Co.* (1970) 398 U.S. 144, 158-61; *United States v. Diebold, Inc.* (1962) 369 U.S. 654, 655; *Stansifer v. Chrysler Motors Corp.* (9th Cir. 1973) 487 F.2d 59, 63.) Meticulous review of the record convinces us that the appellees were not entitled to summary judgment because appellees failed to show that their selection devices were so job related as to be justified by business necessity.

The district court did not specify the legal standard it applied to determine that the LAPD's selection devices were "appropriate" as a matter of law. Yet it is apparent from the district court's opinion and the evidence in the record that proper Title VII standards were not applied. For example, the district court concluded that "[t]he situation here is similar to that in *Washington v. Davis, supra,* 426 U.S. at 245-46, where the Supreme Court stated that it was 'untenable' that a verbal abilities test for a police officer position was improper, even if it excluded a large number of Negroes." (435 F. Supp. at 66.) However, when the Supreme Court reached this conclusion in *Washington v. Davis,* it was applying the Constitution and *not* Title VII. (*Washington v. Davis, supra,* 426 U.S. at 245-46 ("it is untenable that the Constitution prevents the Government" from using a verbal abilities test).) The Supreme Court recognized that Title VII imposed a more stringent standard. "Under Title VII . . . it is an insufficient response to demonstrate some rational

basis for the challenged practices. It is necessary, in addition, that they be 'validated' in terms of job performance . . . . However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution . . . ." (*Washington v. Davis, supra,* 426 U.S. at 246-47.[5])

The degree of justification the district court required for the LAPD's selection devices fell far short of the "business necessity" required by Title VII. The district court stated that because the asserted relationship between the LAPD's selection devices and police duties was "obvious," a less-searching inquiry into their job relatedness was necessary. Noting that there is no single, appropriate method for validating employment tests, the district court held that "defendants need only supply competent and relevant evidence on this issue." The district court based its award of summary judgment on defense affidavits, which "for the most part, merely point out what is obvious and needs little proof." (435 F. Supp. at 65.) We disagree with the district court that, under Title VII, use of the selection devices could be justified in this manner.

To justify the use of pre-employment selection devices as a business necessity, an employer must show that the tests or requirements are so closely job related

---

[5]The district court's erroneous application of the constitutional standard of Washington v. Davis apparently was the source of its conclusion that the LAPD's selection devices were "appropriate" as a matter of law. Selection devices that are insufficiently job related to comply with Title VII may be able to pass muster when the less stringent constitutional standard is applied. *See* Smith v. City of East Cleveland (N.D. Ohio 1973) 363 F. Supp. 1131, *rev'd in part, aff'd in part sub nom.* Smith v. Troyan (6th Cir. 1975) 520 F.2d 492.

that their use is "necessary to safe and efficient job performance." (*Dothard, supra,* 433 U.S. at 332 n.14.) Thus, the burden of demonstrating the job relatedness of selection devices cannot be easily satisfied. (*See Officers for Justice, supra,* 395 F. Supp. at 384 (the large exclusionary impact of certain selection devices requires "a very high degree of persuasion" for defendants to justify their use).) It is not a burden that can be carried by the assertion of an "obvious," but unmeasured, relationship between selection standards and qualities thought necessary for job performance. (*Dothard, supra,* 433 U.S. at 331.) Rather, it is essential that selection devices be "validated" by professionally-acceptable methods. (*Albemarle, supra,* 422 U.S. at 431; *see Washington v. Davis, supra,* 426 U.S. at 247 & n.13.)

In *Albemarle,* the Supreme Court explained the legal standard for determining the job relatedness of selection devices: "discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'" (422 U.S. at 431.) The validation process thus involves at least two distinct aspects. The employer first must determine what "important elements of work behavior" are. Then he must demonstrate that his selection devices are "predictive of or significantly correlated" with the elements of work behavior that have been identified as important.

Validation studies must employ professionally-acceptable methods to increase the likelihood of obtaining trustworthy results. Courts have recognized that a number of validation techniques are professionally accept-

able. (*See Washington v. Davis, supra,* 426 U.S. at 247 n.13 (describing three professional methods of validation).) The Equal Employment Opportunity Commission ("EEOC") has incorporated these techniques into guidelines that outline minimum standards for professional validation studies. (29 C.F.R. § 1607.) The Supreme Court has held that the EEOC guidelines are "entitled to great deference" from courts determining whether employment selection devices comply with Title VII. (*Griggs, supra,* 401 U.S. at 434. *See Washington v. Davis, supra,* 426 U.S. at 247 n.13; *Albemarle, supra,* 422 U.S. at 430-35.) Although compliance with the EEOC guidelines is not mandatory, an employer's burden of justification is much heavier if the guidelines have not been followed. (*United States v. City of Chicago, supra,* 573 F.2d at 427.)[6]

When the proper legal standard for determining business necessity under Title VII is applied to the evidence in the record, it is apparent that appellees were not entitled to summary judgment. Appellees failed to establish that the LAPD's selection devices were so closely job related that their use was justified by business necessity. At most, they showed that there was some rational relationship between their selection devices and certain elements of job performance by police. While this may have been sufficient to satisfy the district court's relaxed standard of review, it fell far short

---

[6]The EEOC guidelines are designed to help employers determine whether their selection devices comply with Title VII. The reason that it is important to follow the EEOC guidelines is because they incorporate professional procedures for test validation that are thought to insure more reliable results. The fact that it may be difficult to professionally validate selection devices does not excuse non-compliance with professional procedures; rather, it suggests that employers should be more cautious in employing selection devices that have discriminatory impacts.

of demonstrating business necessity for the selection devices.

Appellees offered two general justifications for use of the height requirement. They argued that taller officers could more easily control resisting suspects with a minimum use of force and that taller officers had better capacities to observe field situations. They made no attempt to verify empirically the latter justification and the affidavits submitted in support of this theory were insufficient to warrant summary judgment on the issue. (*See United States v. City of Buffalo, supra,* 457 F. Supp. at 625-26; *United States v. Virginia, supra,* 454 F. Supp. at 1088 (opinion evidence that "height and weight are useful in police work" does not prove job relatedness, but rather only "a good faith belief of job-relatedness").)[7] To demonstrate business necessity under the former rationale, appellees would have to show: (1) that subduing suspects with a minimum use of force is an important element of job performance by police, and (2) that height is so significantly correlated with minimization of force in suspect control as to be necessary to safe and efficient job performance by police. Although the Police Departments job analysis indicated that control of resisting suspects occupies only a minor part of police duties, for present purposes we assume, *arguendo,* that it is permissible to require all police to be capable of sub-

[7]Shorter officers may have certain advantages in observing field situations (*e.g.,* the ability to look under objects, the ability to squeeze through narrow passageways) that taller officers lack. The City failed to demonstrate that the net advantages of height in observing field situations were sufficiently great to make the 5′ 6″ height requirement a business necessity.

duing suspects with a minimum use of force.[8] Even on these assumptions, appellees failed to demonstrate that the LAPD's height requirement is so significantly correlated with minimization of force as to make it a business necessity.

The City presented the results of two empirical studies in an effort to validate the height requirement. The first study attempted to correlate the height of police officers with resistance offered by suspects and force employed by officers. Based on questionnaires returned by arresting officers, the study concluded that while "[t]here is no relationship between officer height and suspect resistance, . . . [s]horter officers use strong force more often than do taller officers." The latter conclusion was based on the study's finding that "strong force" was used in 5 percent of all arrests by officers 5′ 8″ and 5′ 9″ in height, 4.5 percent of arrests by officers 6′ and 6′ 1″ in height, and 3.8 percent of arrests by police 6′ 2″ and taller. The second study, based on simulations of police subduing suspects, concluded that taller officers generally perform the bar-arm control hold better than shorter officers. Appellees argued that shorter officers would be forced to resort to stronger force more frequently than taller officers who could better perform the bar-arm control hold.

Appellants vigorously disputed both the methodology and the findings of these studies. The studies failed to show that persons shorter than 5′ 6″ (the level of the height requirement) would be more likely to

[8]*See* the discussion of the availability of less discriminatory alternatives, *infra* at 22. The City's job analysis concluded that an officer had to wrestle with a suspect only once every 20 watches and that an officer was kicked or hit by a subject once every 33 watches.

use strong force than taller persons, because no data was reported for persons shorter than 5′ 6″. Moreover, they noted that the studies failed to control for the effect of experience and job assignment. Appellants also argued that rater bias may have affected the results of the bar-arm control hold study and that neither study had attempted to differentially validate the effect of height by sex.

Appellants' attacks on the methodology of the studies are more than mere quibbles. Because neither of the studies included persons shorter than 5′ 6″, the studies are of little value in determining whether the height requriement excludes individuals who would be more likely to resort to strong force.[9] This criticism is particularly telling in light of appellants' allegation that unreported data in one of the studies showed that persons 5′ 7″ in height use strong force less frequently than persons between 5′ 8″ and 5′ 11″ in height. The lack of controls for experience may have systematically biased the studies' results because shorter officers may have been less experienced, given the previous reduction in the LAPD's height requirement.[10] The first study's ambiguous definition of "strong force" and the lack of controls for the level

---

[9]The EEOC guidelines recognize that validation studies should include persons who are excluded by the selection standards in question. (*See* 29 C.F.R. § 1607.5.)

[10]The LAPD lowered its height requirement from 5′ 9″ to 5′ 8″ in 1954. Thus, all 20-year veterans on the force would be at least 5′ 9″ in height. If the shorter officers in the study had less job experience, the study's results may be the product of job experience and not height. (*See* Boston Chapter, NAACP, Inc. v. Beecher (1st Cir. 1974) 504 F.2d 1017, 1025; League of United Latin American Citizens, *supra,* 410 F. Supp. at 904; Officers for Justice, *supra,* 395 F. Supp. at 380-81; 29 C.F.R. § 1607.5(b)(4).

of suspect resistance, make it of little value in determining whether shorter officers use more force than would be necessary for taller officers to use.[11] The possibility of rater bias in the second study is a potentially serious defect, particularly in light of appellants' allegations that the raters were interested in the litigation and aware of the purpose of the study.[12] Appellees' suggestion that methodological defects cannot controvert the probative force of their studies is amply refuted by existing case law. (*Albemarle, supra,* 422 U.S. at 425-35; *Boston Chapter, NAACP, Inc. v. Beecher* (1st Cir. 1974) 504 F.2d 1017; *League of United Latin American Citizens, supra,* 410 F. Supp. 873; *Officers for Justice, supra,* 395 F. Supp. 378.)

Appellants did not confine their attack to methodological disputes; they also introduced evidence of contrary findings of other studies. They discovered that the City had been involved in four other studies that investigated the relationship of height to job perform-

---

[11]"Strong force" included everything from firing a weapon to use of a baton, sap, or bar-arm control hold. The study failed to distinguish between these different levels of force when reporting the results, even though the premise of the second study was that shorter officers would use the bar-arm control hold less frequently than other forms of strong force. Although data on suspect resistance were reported, no controls were introduced in the study to determine if the force used was excessive in relation to the level of suspect resistance. Although defendants argued that the study showed that police 5′ 8″ and 5′ 9″ used strong force 31 percent more frequently than officers 6′ 2″ and taller, in fact all the study showed was that there was a 95 percent chance that the level of force used by officers 6′ 2″ and taller was different from the level of force used by officers 5′ 8″ and 5′ 9″.

[12]*See Albemarle, supra,* 422 U.S. at 433 n.32 ("It cannot escape notice that Albemarle's study was conducted by plant officials, without neutral, on-the-scene oversight, at a time when this litigation was about to come to trial. Studies so closely controlled by an interested party in litigation must be examined with great care.")

ance by police. Each of these studies had concluded that height was not significantly related to police job performance. One of the studies, the "Drawn Weapon Frequency Survey," had found no correlation between police officer height and the frequency of drawing a weapon. This finding directly contradicted appellees' contention that shorter officers are more likely to use strong force, particularly force stronger than the bar-arm control hold. They also produced numerous depositions from police officials in other major American cities that have reduced or eliminated minimum height requirements for police. This testimony indicated that persons under 5′ 6″ in height can, and are, safely and efficiently performing all aspects of police work.

Viewing all this evidence in the light most favorable to appellants, appellees failed to establish that the LAPD's height requirement was so manifestly job related as to be justified by business necessity.[13]

Appellees sought to demonstrate the job relatedness of the LAPD's physical abilities test through the results of two validation studies. The first study attempted to correlate performance on the five events used in the physical abilities test with 11 measures of success during Police Academy training.[14] The study found

[13]We express no opinion on the question whether appellees will be able to make a successful showing of business necessity at trial. We only hold that the evidence they presented in support of their motion for summary judgment was insufficient to meet their burden of demonstrating business necessity for the height requirement.

[14]The five events on the physical abilities test were: wall scale (running a total of 50 yards and scaling a smooth wall six feet high); hang (running a total of 50 yards and hanging from a chinning bar, using an overhand grip, for one minute); weight drag (running 50 feet and dragging a dead weight of 140 pounds for 50 feet); tremor (running 50 yards and holding

that four of the five events used in the physical abilities test had some significant correlation with at least seven of the 11 measures of training success. The second study concluded that performance on the physical abilities test had some significant correlation with performance of foot pursuit, field shooting, and emergency rescue simulations. Appellees also submitted affidavits detailing the procedures that were used to develop the physical abilities test.

Appellants attacked both the methodology and conclusions of the validation studies, contending that because the studies excluded persons who had failed the physical abilities test, they were of little value in demonstrating that the physical test excluded persons who would be unlikely to succeed as police officers. Moreover, appellants noted that the LAPD had not used a pre-employment physical test during the five years prior to the time when women were first permitted to apply for police officer positions. They questioned whether the physical test had been developed to test a representative sample of major or critical work behaviors as revealed by a careful job analysis. Extensive deposition testimony was presented indicating that po-

a stylus steady for 17 seconds); endurance (running as many laps around a one-eighth mile track as possible in 12 minutes). The 11 measures of success in police academy training were: academy average (combination of academic performance, performance in physical training, marksmanship, and peer evaluations); target shooting III (score received on final test of target shooting performance given in the academy); combat shooting II and III (scores received on last two tests of combat shooting performance); physical training I, II, and III (scores received in the evaluations of performance in the academy physical training exercise program at three different points during training); self-defense (evaluation of self-defense skills at academy); peer evaluations (at 8 weeks and 16 weeks); graduation (whether the officer completed the police academy training courts), (sic)

lice department in other major American cities that do not use pre-employment physical abilities tests have experienced satisfactory job performance by police. Finally, they also questioned appellees' failure to differentially validate the physical abilities test by sex.

Viewing the record in the light most favorable to appellants, we cannot conclude that appellees met their burden of justifying use of the physical abilities test as a business necessity. The fact that the LAPD hired thousands of male police officers between 1968 and 1973 without using any pre-employment physical test suggests that the practice is not essential to safe and efficient job performance.[15] Moreover, the modest correlations between scores of successful candidates on the physical test and scores during academy training on peer evaluations, tests of physical ability and shooting skills, hardly establish that the physical test is so intimately related to job performance as to be a business necessity.[16] Appellees had to demonstrate that

---

[15]*See* Officers for Justice, *supra,* 395 F. Supp. at 384-85; 29 C.F.R. § 1607.11 ("no new test or other employee selection standard can be imposed upon a class of individuals protected by Title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.")

[16]Although appellees' claim that 4 of the 5 events used in the physical abilities test had some significant correlation with at least 7 of the 11 measures of training success sounds impressive, a closer analysis of the study reveals far less impressive results. The 11 measures of academy performance were based only on measures of shooting ability, physical ability, self-defense skills, and peer evaluations. The magnitude of the correlations for all but the 3 measures of physical training were always less than r = .3, indicating that less than 9 percent of the variance in the academy performance measures was explained by performance on the components of the physical abilities test. (*See* Johnston, *Economic Methods* 35 (1972).)

their measures of training success are themselves significantly related to important aspects of job performance and they utterly failed to do so.[17]

---

[17]Appellees offered conclusory affidavits to the effect that the measures of academy performance were themselves significantly related to job performance. For example, a police academy instructor justified the peer evaluation measures on the grounds that "[t]he ability to establish a favorable rapport with peers and the public is an essential requirement for the professional Police Officer." While we do not question the desirability of having police officers with social skills, appellees cannot demonstrate that a physical test is job related because it measures the capacity of police to develop rapport with others in training.

We do not read Washington v. Davis, *supra,* 426 U.S. at 250-51, as establishing that selection devices may be validated for Title VII purposes without reference to job performance. Washington v. Davis simply approved the use of a verbal abilities test to determine whether applicants had the capacity to understand a police training program. (*See* Washington v. Davis, *supra,* 426 U.S. at 255-56 (Stevens, J., concurring); *but see* National Education Association v. South Carolina (1978) 434 U.S. 1026 (White, J., dissenting from summary affirmance).) If employers were permitted to validate selection devices without reference to job performance, then non-job-related selection devices could always be validated through the simple expedient of employing them at both the pre-training and training stage. As the Second Circuit noted in Vulcan Society v. Civil Service Commission (2d Cir. 1973) 490 F.2d 387, 396 n.11: "The danger of distortion in this regard is particularly acute, since performance in the probationary school is also evaluated by means of a written examination. Thus, there is a distinct possibility that a claim that the qualifying examination tests for ability to learn in the probationary school is in fact no more than a claim that performance on the written qualifying examination predicts with reasonable accuracy performance on the written probationary examination. Without evidence that the second examination is job-related, such a demonstration is barren indeed."

Here, the strongest correlation shown by appellees' validation study was between performance on the pretraining physical abilities test and performance during training on physical abilities tests. This is not sufficient to validate the use of the physical abilities test without an independent demonstration of its relation to job performance.

Summary judgment on appellants' Title VII claims relating to appellees' post-1973 selection devices must be reversed.[18]

Availability of Less Discriminatory Alternatives

Even if an employer meets his burden of demonstrating business necessity, Title VII plaintiffs may prevail if they show that alternative selection devices are available that would serve the employer's legitimate interests without discriminatory effects. (*Albemarle, supra,* 422 U.S. at 425.) Although the judgment must be reversed on the other grounds heretofore discussed, we nevertheless reach the alternative selection aspect of this Title VII action to avoid repetition of error that occurred in granting the motion for summary judgment.

The district court concluded that the LAPD "could be so structured as to permit the employment of an equal percentage of male and female applicants." (435 F. Supp. at 65.) However, the court held that the LAPD could not be required to adopt less discriminatory alternatives if they required modification of departmental policies. In support of this proposition, the district court cited *Rizzo v. Goode* (1976) 423 U.S. 362. Compliance with the commands of Title VII may indeed require modification of departmental policies, and nothing in *Rizzo v. Goode* suggests that the contrary is true.

---

[18]Because the district court premised its rejection of appellants' challenges to other employment practices of the LAPD on its holding that the physical test and height requirement were appropriate selection devices as a matter of law, we need not discuss the other employment practices appellants challenge. We reverse the district court's award of summary judgment in its entirety.

In *Rizzo,* the Supreme Court held that in absence of showing direct responsibility on the part of police officials for violations of rights by a small percentage of the police force, federal courts lacked power to require a local police department to adopt a new civilian complaint processing procedure. In our Title VII case, unlike the situation in *Rizzo,* the appellees here are themselves charged with violations of federal law. Acting pursuant to its constitutional authority, Congress has removed whatever latitude local police departments may ever have had to engage in sex discrimination. So long as non-discriminatory alternatives serve the legitimate interests of the police in safe and efficient job performance, police departments cannot pursue policies that require the use of selection standards that are themselves prima facie violations of Title VII.

III

EQUAL PROTECTION CLAIMS

The district court awarded summary judgment to appellees on the claims founded on the equal protection clause of the Fourteenth Amendment and the Civil Rights Act of 1871. (42 U.S.C. 1983.) The district court held that neither the sex-segregated job classifications used by the LAPD before July 1, 1973, nor the selection devices used by the LAPD after that date, denied appellants equal protection. Because the statutory prohibition of sex discrimination embodied in Title VII is more comprehensive than the constitutional ban, it was necessary for the district court to reach the constitutional issue with respect to the selection devices used only after Title VII became applicable to the LAPD. Thus, we express no opinion about the district court's conclusion that no evidence of dis-

criminatory intent supported appellants' constitutional attack on the employment practices used by the LAPD after July 1, 1973. Because the sex-segregated job classifications were used before Title VII became applicable to the LAPD, we review the district court's holding that this practice did not contravene the equal protection clause.

As the district court recognized, undisputed evidence established that the LAPD used a gender-based system of job classifications during the period before Title VII became applicable to agencies of local government. Separate job classifications existed for men and women. Policewomen were not permitted to undertake regular patrol assignments, and they were barred from promotion above the level of sergeant.

In *Craig v. Boren* (1976) 429 U.S. 190, the Supreme Court outlined the standard of review to be applied to gender-based classifications under the equal protection clause. The Court held that: "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." (429 U.S. at 197.) Among the objectives that have been held insufficient to justify gender-based classifications are "administrative ease and convenience," and "fostering 'old notions' of role typing." (*Craig v. Boren, supra,* 429 U.S. at 198; *Frontiero v. Richardson* (1973) 411 U.S. 677; *Stanton v. Stanton* (1975) 421 U.S. 7.)

The district court purported to apply the *Craig v. Boren* standard to determine that the LAPD's gender-based job classifications did not violate the equal protection clause. The district court first concluded "that the qualities of disposition, and physical size and

strength are substantially related to the important governmental objective of providing an effective police force." (435 F. Supp. at 61.) The district court then considered whether gender was substantially related to the selection of police officers with these qualities. Citing *Schlesinger v. Ballard* (1975) 419 U.S. 498, the district court said that "[t]he Supreme Court has at least implicitly approved the exclusive use of men in combat positions. The same factors of size, strength, and disposition which make a man a more effective combatant than a woman in the event of war, also act to make a man a better Police Officer than a woman in those areas where physical tasks are involved." (435 F. Supp. at 60.) Thus, the district court concluded that the LAPD's job classifications did not violate the equal protection clause because "a classification based upon gender is substantially related to and serves [the] important governmental objective [of providing an effective police force]." (435 F. Supp. at 61.)

Even if we assume, *arguendo,* that qualities of size, strength, and disposition are substantially related to the important objective of maintaining an effective police, it does not follow that women may constitutionally be excluded from serving as police officers. It must also be demonstrated that women lack the requisite size, strength, and disposition to be effective police. The Supreme Court's decision in *Schlesinger v. Ballard* provides no support for the proposition that women cannot be effective police or combatants. The issue in *Schlesinger v. Ballard* was not whether women could be excluded from combat duty, but whether the "disadvantageous conditions suffered by women" who were excluded from certain aspects of military service

could be remedied by providing them more time before subjecting them to mandatory discharges. (*Schlesinger v. Ballard, supra,* 419 U.S. at 508 ("Appellee has not challenged the current restrictions on women officers' participation in combat and in most sea duty."); *Craig v. Boren, supra,* 429 U.S. at 198 n.6 ("*Kahn v. Shevin,* 416 U.S. 351 (1974) and *Schlesinger v. Ballard,* 419 U.S. 498 (1975), upholding the use of gender-based classifications, rested upon the Court's perception of the laudatory purposes of those laws as remedying disadvantageous conditions suffered by women in economic and military life").) The Supreme court held that a gender-based classification could be used to remedy a disadvantage shared by all members of one sex to which it applied. (*Schlesinger v. Ballard, supra,* 419 U.S. at 508-10.) Thus, *Schlesinger v. Ballard* provides no authority to support the exclusion of women from police patrol work, though it might support the constitutionality of actions to compensate women for that disadvantage.

It is undisputed that not all women lack the requisite traits to be effective police officers. The LAPD's experience since abolition of its gender-based job classifications amply demonstrates that women can be effective police. The district court did not dispute this. Instead, the court held that "[t]here has to be only a substantial relationship between the relevant traits and gender," in order to justify the exclusion of all persons of one gender from positions requiring the relevant traits. (435 F. Supp. at 60.) This conclusion is contrary to the clear teachings of a long line of Supreme Court decisions that "archaic and overbroad generalizations" cannot justify "statutes employing gender as an inaccurate proxy for other, more germane bases of classification." (*Craig v. Boren, supra,* 429 U.S. at 198; *Weinberger v. Wiesenfield* (1975) 420 U.S. 636 (financial position of working women); *Frontiero v. Richardson* (1973) 411 U.S. 677 (financial position of servicewomen); *Reed v. Reed* (1971) 404 U.S. 71 (capabilities of women to be estate administrators). *Cf. Schlesinger v. Ballard, supra,* 419 U.S. at 508.) The fact that persons of one gender are less likely to possess certain traits than persons of the other gender cannot justify a gender-based classification unless the congruence between gender and possession of the traits is so great, and the prospects of developing more accurate proxies for the traits are so small, that the gender-based classification cannot be said to be based on administrative ease or convenience. (*Craig v. Boren, supra,* 429 U.S. at 198.)

We hold that undisputed facts before the district court established that the gender-based job classifications used before Title VII became applicable to the LAPD violated the equal protection clause of the Fourteenth Amendment. Exclusion of all women from regular police patrol duties and from promotions above the level of sergeant was not substantially related to the achievement of an important governmental objective. Because women could have served as effective police officers during this period, we can only conclude that the dual classification system was designed to serve administrative convenience and not to promote the maintenance of an effective police force. Thus, the gender-based classification system violated the equal protection clause, and appellees were not entitled to summary jdugment on this portion of the constitutional claim.

IV

CROSS-APPEAL OF THE CLASS CERTIFICATION

The district court certified this action as a class action under Rules 23(b)(1) and 23(b)(2) of the Federal Rules of Civil Procedure on June 10, 1976.[19] On July 11, 1977, the district court entered summary judgment in favor of appellees. After appellants filed an appeal from the judgment, appellees filed a cross-appeal from the judgment "insofar as that judgment was based upon the Court's 'Order Certifying Class'." Appellees on cross-appeal ask this court, in the event any issue is remanded for further proceedings, to instruct the district court to re-examine the class certification order. They suggest that the named appellants might not adequately represent the interests of the certified class, but they fail to specify any reasons for this fear.

Orders granting class certification normally are not appealable because they are not "final decisions" within the meaning of 28 U.S.C. § 1291. (*Blackie v. Barrack* (9th Cir. 1975) 524 F.2d 891.) Appellees are able to bring their cross-appeal only because the district court's award of summary judgment to them constituted a final judgment. Because the district court's judgment

[19]The certified class was composed of "all women who are: a) Current and future applicants for all sworn positions at the Los Angeles Police Department, including, but not limited to, current and future applicants for the position of "police officer;" b) All past applicants for sworn positions at the Los Angeles Police Department who applied within the applicable statute of limitations period, including, but not limited to, applicants for the position of "police officer" (or pre-July 1973 equvalent); c) Current and future employees in sworn positions at the Los Angeles Police Department; d) Current and future retirees from such sworn positions at the Los Angeles Police Department who will be eligible for retirement payments or benefits within the applicable statute of limitations period."

was in appellees' favor, their cross-appeal from the class certification order would have become moot if we had affirmed the district court's judgment. The only reason the class certification issue has not become moot is because we reverse the district court's summary judgment award and remand the case for further proceedings, Under these circumstances, it would not be appropriate for us to decide appellees' cross-appeal challenging the class certification order. The same considerations that normally bar interlocutory review of class certification orders (*see Blackie v. Barrack, supra,* 524 F.2d at 895; *see also Coopers & Lybrand v. Livesay* (1978) *437* U.S. 463, 473 ("The potential waste of judicial resources is plain.")), persuade us that we should not now review the class certification order merely because the district court erroneously entered summary judgment for appellees. Because we remand the case for further proceedings, the class certification order may be modified later. (Fed. R. Civ. Proc. 23(c)(1).) Nothing precludes appellees from obtaining review of the order after final judgment ultimately is entered. (*Coopers & Lybrand v. Livesay, supra, 437* U.S. at 469.)

The judgment is reversed and the cause is remanded to the district court for further proceedings consistent with the views herein expressed. Appellants are awarded their costs together with a reasonable attorney's fee as costs for the successful prosecution of this appeal. (42 U.S.C. § 2000e-5(k).)

APPENDIX B.

Memorandum Opinion.

United States District Court Central District of California.

Fanchon Blake, et al., Plaintiffs, v. City of Los Angeles, et al., Defendants. No. CV 73-1962-JWC.

Filed: May 13, 1977.

This class action is an across-the-board attack on alleged sexually discriminatory practices of the City of Los Angeles in the operation of its Police Department. Jurisdiction is claimed under 28 U.S.C. § 1343 (3) and (4). The action is brought under 42 U.S.C. § 1983, the Fourteenth Amendment of the United States Constitution, and Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, *et seq.*).

The challenged practices have occurred over a time span embracing three different periods; each period brings into play different considerations and different standards of review.

The first relevant period was that prior to March 24, 1972, the date upon which Title VII was made applicable to "governments, governmental agencies [and] political subdivisions." During this period, the City maintained two separate employment classifications for its sworn police officers, "Policemen" and "Policewomen".

The second relevant period runs from the Title VII effective date of March 24, 1972 until June 1973, when the City of Los Angeles put into effect a new hiring system. The City continued the dual system

of Policemen and Policewomen during this fifteen month period.

The third period commences in June 1973, when the City attempted to comply with Title VII. Under the new hiring system, the gender-based classifications were abandoned and the single position of sworn "Police Officer" was established. As a part of the new procedure, the City also established candidate selection criteria and policies relating to promotions, pay grades, transfers, retirement, and pension benefits. Although the new policies were not based on gender, they resulted in a statistically greater impact on women than men.

The defendants have moved for summary judgment. In support of their respective positons upon the issues raised by the motion, the parties have furnished the court with voluminous affidavits and a vast amount of statistical data. In addition thereto, the parties have entered into a pretrial conference order containing a stipulation of facts, which has largely limited the factual issues and greatly facilitated a pretrial determination of the many legal questions presented by this case.

1. STATUTE OF LIMITATIONS

As a threshold issue, the defendants have questioned the statute of limitations applicable to the claims under 42 U.S.C. § 1983. The initial complaint was filed August 20, 1973. It is well settled in California that the applicable statute of limitations for civil rights actions brought under 42 U.S.C. § 1983 is the three year statute provided in section 338(1) of the California Code of Civil Procedure. *Donovan v. Reinbold,* 433 F.2d 738, 741 (9th Cir. 1970), and *Smith v. Cremins,* 308 F.2d 187 (9th Cir. 1962). This being so, plaintiffs' claims are not barred by the applicable statute of limitations.

II. PERIOD PRIOR TO MARCH 24, 1972

Plaintiffs' first challenge is directed to the City's employment practice for the period prior to March 24, 1972, when the City mantained the separate classifications of "Policemen" and "Policewomen". Plaintiffs urge that this classification system violated the equal protection clause of the Fourteenth Amendment. Although Policemen and Policewomen were both sworn officers, they had different lines of promotion and different types of duties. Policemen were assigned to the more physical tasks, including work on patrol and in the field. Policewomen generally were assigned to specialized tasks and inside work.

In our approach to the question of whether these classifications comply with constitutional requirements, we must first decide what standard of review is applicable. This is a problem fraught with some confusion because of the lack of clarity in the case law.

In a "traditional" equal protection analysis, a legislative classification must be sustained unless it is patently arbitrary. *Frontiero v. Richardson,* 411 U.S. 677, 683 (1973). *See, Jefferson v. Hackney,* 406 U.S. 535, 546 (1972); *Richardson v. Belcher,* 404 U.S. 78, 81 (1971); *Dandridge v. Williams,* 397 U.S. 471, 485 (1970); *McGowan v. Maryland,* 366 U.S. 420, 426 (1961); and *Flemming v. Nestor,* 363 U.S. 603, 611 (1960).

The plaintiffs, however, contend that a classification based upon sex is similar to a classification based upon race, alienage, and national origin. A gender-based classification would then be inherently suspect and subjected to close judicial scrutiny.

In *Frontiero v. Richardson, supra,* the challenged statute provided that the spouse of a serviceman was deemed a dependent for purposes of obtaining certain privileges. However, the spouse of a female member of the armed services was not deemed a dependent, unless he were in fact dependent on his wife for over one-half of his support. The government admitted that the only justification for such a classification was "administrative convenience." The Court decided that a classification based upon sex could not be justified on the sole ground of "administrative convenience" and struck down the classification as being a denial of equal protection. In a plurality decision, four justices held that classifications based on sex were inherently suspect and subject to strict judicial scrutiny. 411 U.S. at 688. Mr. Justice Stewart concurred in the result. *Id.* at 691.

Notwithstanding *Frontiero,* a majority of the Supreme Court has not yet added sex to the list of suspect classifications. The Court has suggested, however, that a classification based upon sex will have to be justified by more than the traditional "rational" connection between the classification and some valid legislative purpose. *See, Berkelman v. San Francisco Unified School District,* 501 F.2d 1264, 1269 (9th Cir. 1974.) The Court has never rejected gender as an impermissible classification in all instances. *See, e.g., Schlesinger v. Ballard,* 419 U.S. 498 (1975), and *Kahn v. Shevin,* 416 U.S. 351 (1974).

In *Schlesinger,* the Court upheld a classification based upon sex. In that case a naval officer challenged a statutory mandatory discharge provision, which required his discharge before a similarly situated female officer would be discharged. The Court recognized

the differing types of service which each sex was likely to render and upheld the classification, saying:

> "In both *Reed* and *Frontiero* the reason asserted to justify the challenged gender-based classifications was administrative convenience, and that alone. Here, on the contrary, the operation of the statutes in question results in a flow of promotions commensurate with the Navy's current needs and services to motivate qualified commissioned officers to so conduct themseves that they may realistically look forward to higher levels of command. This Court has recognized that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' *Toth v. Quarles,* 350 U.S. 11, 17. See also *Orloff v. Willoughby,* 345 U.S. 83, 94. The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, (citations omitted) and with the President. . . . We cannot say that, in exercising its broad constitutional power here, Congress has violated the Due Process Clause of the Fifth Amendment." 419 U.S. at 510.

In my view, the rule governing our inquiry is set forth in *Craig v. Boren,* 429 U.S. 190, 45 U.S.L.W. 4057 (December 20, 1976). After analyzing its recent decisions in this field, the Court stated:

> "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Id.* at 4059.

This approach was reaffirmed by the Court in *Califano v. Goldfarb,* 430 U.S. 199, 45 U.S.L.W. 4237 (March

2, 1977). Under this standard of review, we must determine whether the gender-based classification in this case has a substantial relationship to the achievement of an important governmental objective.

The City of Los Angeles has a compelling governmental interest in providing police services to the community. As was stated in *Kelley v. Johnson,* 425 U.S. 238, 247 (1976):

> "The promotion of safety of persons and property is unquestionably at the core of the State's police power, and virtually all state and local governments employ a uniformed police force to aid in the accomplishment of that purpose."

In assessing the relation of gender to this important governmental objective certain basic facts are apparent:

1. One of the most vital functions a municipality performs is the establishment of an effective police force to protect the lives and property of its citizens, to enforce its laws, and to preserve and maintain peace and tranquility within the community.

2. This police force must consist of Police Officers who upon an appropriate occasion have the capacity to restrain, control, subdue, arrest, or capture persons who are a threat to the community, and who are or can become aggressive, vicious or violent.

3. As defendants' affidavits clearly show and common sense confirms, physical size, strength, and agility have a direct relation to the quality of the performance of these functions. It is also important to have the kind of temperment which allows one to engage unhesitatingly in strenuous physical contact with another whenever the occasion demands.

4. These qualities are essential to an effective, efficient, and functional police force.

Therefore, the only remaining question is whether a classification by gender is substantially related to the selection of Police Officers with the necessary qualities. It is not required that all men have the necessary qualities and that no women have them. There has to be only a substantial relationship between the relevant traits and gender.

The qualities in issue here are similar to those which prompt the selection of men for the fighting segments of our armed forces. Congress has not seen fit to draft women, and women are used in the armed forces in positions which have only an incidental relationship to actual combat. The Supreme Court has at least implicitly approved the exclusive use of men in combat positions. In *Schlesinger v. Ballard, supra,* the Court relied on this classification to justify the additional gender-based classification at issue in that case. The same factors of size, strength, and disposition which make a man a more effective combatant than a woman in the event of war, also act to make a man a better Police Officer than a woman in those areas where physical tasks are involved.

Plaintiffs have suggested that a Police Officer needs superior size and strength on relatively few occasions, compared with the other duties an officer is called upon to perform. They therefore conclude that a gender-based classification relevant to these limited situations is not justified. It may well be true that these occasions occur relatively infrequently. But the possibility of such an occurrence exists at all times, and a city is justified in a desire to have a police department

capable of exercising whatever degree of force is required, the instant it is required. Furthermore, a police force known to be capable of striking fast and hard whenever necessity demands is a strong deterrent to criminal activity. The fact that many cities have such a force is almost certainly one reason why instances of physical confrontation are so infrequent.

I conclude therefore that the evidence before this court establishes without substantial contradiction that the qualities of disposition, and physical size and strength are substantially related to the important governmental objective of providing an effective police force. I further conclude that a classification based upon gender is substantially related to and serves this important governmental objective. Therefore, the classification of Policemen and Policewomen as established by the defendants for the period prior to March 24, 1972 was valid and did not offend the equal protection clause of the Constitution.

III. PERIOD FROM MARCH 24, 1972 TO JUNE 1973

On March 24, 1972, the provisions of Title VII were expanded to include governments, governmental agencies, and political subdivisions. Title VII subjects an alleged discriminatory classification to a more stringent judicial scrutiny than was required under an equal protection analysis.

Defendants do not claim that the dual classification system for Policemen and Policewomen in effect during this period would comply with the requirements of Title VII. Defendants contend that, irrespective of whether or not this system can withstand Title VII review, the City was justified in continuing the

practice until at least June 1973, on the grounds of bonafide business necessity.

The "business necessity test" is one criteria used to determine whether a practice is unlawfully discriminatory under Title VII. This test is used because the courts recognize that the continuation of an employment practice is sometimes justified, regardless of its discriminatory impact. The court in *Robinson v. Lorillard Corporation*, 444 F.2d 791, 798 (4th Cir. 1971), stated:

> "The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact."

When Title VII was first enacted, it provided for a one year grace period to allow private employers to adjust to the provisions of the Act. When it was made applicable to governments, governmental agencies, and political subdivisions, however, no such grace period was provided. Obviously, it would take some time for an agency as large as the Los Angeles Police Department to accommodate itself to the new requirements. The necessity of maintaining a functioning police department during the transition period would surely meet the test of an overriding legitimate business purpose. This necessity would justify the continuance of the employment practice for the period of time reasonably necessary to enable the City to bring itself into compliance with the Act.

The uncontradicted affidavits filed by the defendants detail the activities of those in charge of formulating and implementing the reorganization of the Department. They establish that the City made a good faith effort to comply with the Act, and that the time required to put the revised hiring practice into effect was not unreasonable under the circumstances.

I hold therefore that during the interim period between March 24, 1972 and June 1973, defendants' hiring plan comes within the "business necessity" exemption and consequently did not violate the provisions of Title VII. I have previously concluded that this dual classification system did not violate the Fourteenth Amendment.

IV. PERIOD SUBSEQUENT TO JUNE 1973

In June 1973, the Los Angeles Police Department was reorganized. The dual classifications of "Policewomen" and "Policemen" were abandoned, and a single classification of "Police Officer" was established without reference to sex. With the initiation of this plan, new rules and regulations were promulgated. The new policies included the establishment of certain entry-level selection standards.

Under the new system, an applicant was required to have a minimum height of 5' 7". The height requirement was reduced to 5' 6" less than a year later. An applicant was also required to pass a physical abilities examination designed to test physical endurance, strength, and agility. This test consists of five

events; each event is graded on the basis of 1-100, according to the candidate's performance. The combined score on all events must equal or exceed 350. These tests are:

1. Wall scale—run a total of 50 yards then scale a smooth wall 6 feet high. (17 seconds)

2. Maintain grip—run a total of 50 yards then take an overhand grip on a chinning bar and maintain grip for one minute. (16 seconds run plus 60 seconds on the bar)

3. Weight drag—run 50 feet then drag a dead weight of 140 pounds for 50 feet. (16 seconds)

4. Tremor test—run a total of 50 yards then hold a stylus steady for 17 seconds. (17 seconds run plus 100 points on the stylus)

5 Endurance run—run as many laps as possible in 12 minutes on a one-eight mile track. (10 laps)

(The performance in parenthesis is that which will yield the average passing score of 70 points per test.)

As might well be expected, relatively fewer women than men were able to qualify on the basis of either height or strength. Consequently, these two requirements imposed a severe adverse impact upon women.

A. EQUAL PROTECTION REVIEW OF THE NEW REQUIREMENTS

After some confusion among the circuits, the Supreme Court has recently decided two cases clarifying the requirements of the Fourteenth Amendment. Under an Equal Protection analysis, an adverse statistical impact alone does not establish a prima facie case of unconstitutional discrimination. There must be additional proof of a discriminatory purpose as a motivating factor in the decision. Such a motive need not be the sole

motive, or even the dominant or primary motive, but it must be one of the motives for the decision. *Washington v. Davis,* 426 U.S. 229 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 45 U.S.L.W. 4073 (January 11, 1977). In *Washington,* the Court said:

> "[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, *McLaughlin v. Florida,* 379 U.S. 184 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." 426 U.S. at 242.

Since statistical impact alone is not sufficient to establish a prima facie case, and since there is no other evidence of discriminatory purpose or motive upon the record before us,[1] plaintiffs' challenge on Fourteenth Amendment grounds must fail.

---

[1]The record before this court contains no evidence of discriminatory intent. Plaintiffs argue that it was the avowed policy of the management officers prior to 1973 to exclude women "per se" from police work. The affidavits, however, do not support this contention. The statements attributed to Chief Davis gives no indication that women "per se" were being excluded; his references to men and women were entirely consistent with the legitimate purposes of the then current classification. If anything, the evidence here shows an intent not to discriminate. For instance, the defendants challenge the minimum height requirement. The City has always had a minimum height require-

(This footnote is continued on next page)

B. TITLE VII STANDARDS OF REVIEW

In a Title VII review, a more probing judicial inquiry is required, and the mere showing of a disproportionate impact alone has been held to establish a prima facie case. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1970). However, if applying Title VII standards to local and state agencies brings into play a standard more stringent than appropriate under the Fourteenth Amendment, there would appear to be a constitutional conflict with the Tenth Amendment. Although the Supreme Court has not yet addressed itself to this issue,[2] two district courts have. *Harrington v. Vandalia-Butler Board of Education*, 418 F. Supp. 603 (S.D. Ohio, 1976), and *Scott v. City of Anniston*, 430 F. Supp. 508, 45 U.S.L.W. 2498 (N.D. Ala., March 31, 1977). The *Harrington* case applied the strict standards of *Griggs v. Duke Power Co., supra,* to state agencies.

In the *Scott* case, the court applied the rule established in *Washington v. Davis, supra,* requiring proof of a discriminatory motive or purpose. In analyzing the problem, the court in *Scott* said:

> "Whether the extension of Title VII to state and local government employment means that impact will not suffice and intent is currently the factor, is decidedly an open question. It hinges

ment, even when all "Police Officers" were men. The minimum height was 5' 9" in 1919. This was lowered to 5' 8" in 1954, and to 5' 7" in 1971. It was lowered again in 1974 to the present requirement of 5' 6", for the specific purpose of lessening the impact on female applicants.

[2]In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Supreme Court expressly stated that they were not presented with a contention ". . . that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under section 5 of the Fourteenth Amendment." *Id.* at 456, n.11.

> upon what constitutional grant of power Congress has relied upon in extending the coverage of Title VII over state and local governments. If Congress is seen, as in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), to have extended Title VII in implementation of the Fourteenth Amendment, no more stringent standard would be appropriate than that for which the Fourteenth Amendment calls, i.e., intent. If Congress is alternatively assumed to have acted in the exercise of its power to regulate interstate commerce, one comes to the Supreme Court's decision in National League of Cities v. Usery, 426 U.S. 833 (1976), in which the Court struck down an attempt by Congress to regulate employment decisions of state and local governments under the Commerce Clause powers of Congress. Without the Commerce Clause as an appropriate alternative basis, it would appear that Congress's extension of Title VII to state and local governments cannot supplant the intent standard of Washington v. Davis, with the more stringent impact standard of Griggs v. Duke Power Co.
>
> In view of this analysis, this court believes that the intent standard, i.e., that there must be proof of discriminatory racial purpose as in Washington v. Davis, should be applied in civil rights litigation brought under Title VII (or 42 U.S.C. §1981). The Supreme Court held in Fitzpatrick, at 620, [Sic, at 447] that the authority for the 1972 amendment extending Title VII to state and local governments was the Fourteenth Amendment * * *. Therefore, it is simple logic that a statute can be no broader than its constitutional base. Consequently, since the extension of Title

> VII to state and local government rests upon the Fourteenth Amendment, the statute cannot be any broader than the constitutional authority upon which it is based. It follows that in Title VII cases against a state or local government the statute is to be construed in accordance with the constitutional test adopted by the Court in Washington; i.e., there must be proof of discriminatory racial purpose." 45 U.S.L.W. at 2498.

The Ninth Circuit has not addressed the constitutional question of the proper scope of Title VII as applied to state and local governments. The Circuit has considered the problem of the requirements of a prima facie case under Title VII, using a "probative" approach. *United States v. Ironworkers Local 86,* 443 F.2d 544 (9th Cir. 1971). In that case, the court upheld a trial court's findings that a prima facie case of discrimination had been established. The appellant sought a reversal on the ground that the prima facie case had been based upon statistics alone. In affirming the decision below, the court said:

> "We are not faced with a situation where a court has relied upon statistical data alone. On the contrary, in its findings, the district court cited specific instances of discrimination on the part of the unions and the apprenticeship committees. Thus the statistical evidence is complementary rather than exclusive." 443 F.2d at 551.

The Fourth Circuit has adopted a similar approach in *Roman v. ESB, Inc.,* 550 F.2d 1343, 14 FEP Cases 235 (4th Cir., December 23, 1976). After analyzing earlier decisions in that circuit, the *Roman* court suggests that statistical impact alone may be sufficient

to establish a prima facie case only where the proof discloses "no objective standards based upon education, experience, ability, length of service, reliability, or aptitude, to account for the preferential employment . . ." 14 FEP Cases at 241.

C. PLAINTIFFS' EVIDENCE

The only evidence plaintiff has offered to support the Title VII claim is statistical analyses of the effect of defendants' height and physical abilities requirements. Statistical comparisons and exhibits often give rise to an inference of racial discrimination. However, the same inference does not necessarily follow when a claim of sexual discrimination is asserted. Contrary to the usual situation involving racial discrimination against a Black, there are obvious physical differences between males and females. If these differences are relevant to an important governmental objective, then the inference of a discriminatory purpose is improper.

Furthermore, an inference raised from statistics is not conclusive proof of discrimination. It merely shifts the burden of proof to the defendant. Statistical evidence does not relieve the court of its obligation to determine whether the plaintiffs have established the truth of their allegations. The defendant may overcome a prima facie case by producing credible evidence which rebuts an inference of discrimination. The defendant is not required to produce a preponderance of such evidence; the risk of nonpersuasion remains with the plaintiff. Thus, the City may refute any inference of discrimination by introducing evidence that explains their employment practices on the basis of legitimate non-discriminatory grounds.

The plaintiff's proof, as noted earlier, consists solely of a showing of statistical impact. There is no separate evidence of a discriminatory pattern or policy. Even if we are to assume, arguendo, that the plaintiff's statistics give rise to an inference of illegal discriminatory motives, the inference has been rebutted by uncontroverted evidence in the record.

D. DEFENDANTS' EVIDENCE

The defendants have offered abundant proof of the objectivity of the requirements of physical size and strength. Plaintiffs urge that the defendants' proof of the job-relatedness of its employment practices does not "validate" the practices in the manner recommended in the EEOC regulations. There is no magic in any validating procedure, and the defendants need only supply competent and relevant evidence on this issue. As the Supreme Court said in *Washington v. Davis:*

> "It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance." 426 U.S. at 247, n.13.

The more obscure the justifications are, the more searching the inquiry must be. Conversely, the more obvious the relationship between the classification and the job requirements, the less searching the inquiry becomes.

The defendants' affidavits, for the most part, merely point out what is obvious and needs little proof. The affidavits suggest that a stronger and taller officer can more quickly and effectively control another person in the event of a confrontation. This officer is more likely to be able to do so without having to resort to extreme force, such as the use of a gun or a dangerous control hold. In self-defense situations,

the taller and stronger officer is more likely to be successful. The taller the officer, the better his opportunity to observe, evaluate, and properly judge situations in the field. Furthermore, the series of tests to which plaintiffs object was designed by a professional kinesiologist employed by the City specifically to formulate a relevant physical ability test. The expert's opinion that the physical ability test has a direct and rational relationship to the tasks performed by Police Officers, affirms the obvious facts.[8]

Plaintiffs have also contended that defendants' evidence of job relatedness is refuted by the fact that several other police departments use men and women as Police Officers, with less stringent entrance requirements than the City of Los Angeles. Of course, an effective police force can be structured to include both male and female officers. However, this fact does not support plaintiffs' contention that physical size and strength have no relation to the job's requirements. In such an organization sex differences are almost certainly recognized. These characteristics probably in-

---

[8]Plaintiffs have filed an affidavit by George H. McGlynn, who purports to be an expert in the effects of stress and fatigue on muscle strength and endurance. Plaintiffs rely upon this affidavit to demonstrate a factual dispute with respect to the propriety of the defendants' physical tests. The McGlynn affidavit states:

> "I will testify that the *only* job related preemployment physical test for a job such as a police officer is a cardiovascular efficiency test . . ."

This statement is inappropriate and without significance in this inquiry. The proposed test determines only whether the particular person is "physically fit". It fails to take into account the wide range of quality-performance variables among those applicants who could successfully pass the cardiovascular efficiency test proposed by the affiant. The defendants' selection tests determine the degree of performance-quality and permit the City to discover the best qualified applicants. In my view, this affidavit raises no issue of fact.

fluence the job assignments made at the administrative level. Certainly, a sane chief of police would not dispatch a group of women of average female height, weight, and strength to contain a public uprising such as the "Watts riots", when the same number of men possessing the height, weight, and strength of average males are available.

The Los Angeles Police Department could be so structured as to permit the employment of an equal percentage of male and female applicants. However, the City has chosen to have a police department where every officer is able to meet any confrontation with the minimum amount of necessary force. In reviewing the City's plan, this court must not lose sight of the well established rule that a government has traditionally been granted the widest latitude in the dispatch of its own internal affairs. *Rizzo v. Goode*, 423 U.S. 362 (1976).

Rizzo involved a claim under 42 U.S.C. § 1983, for an alleged pattern of unconstitutional police mistreatment of minority citizens and city residents in general. The district court ordered the city to submit a program for handling citizen's complaints of police misconduct. A proposed program was thereafter negotiated between the parties and was included in the final judgment of the district court. The Supreme Court held this action was an unwarranted intrusion by the federal judiciary into the discretionary authority committed to the state under the Eleventh Amendment. The Court stated:

> "When plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with 'the well-established rule that the government has traditionally

> been granted 'he widest latitude in the "dispatch of its own internal affairs".' [citations omitted] The District Court's injunctive order here, significantly revising the internal procedures of the Philidelphia Police Department, was indisputably a sharp limitation on the department's 'latitude in the "dispatch of its own internal affairs".'" 423 U.S. at 378-79.

Our inquiry here cannot extend to the wisdom of the City's decision on the type of police force it desires, nor to possible alternatives directed toward the accomplishment of sociological goals. The question before us is simply, "Does the Los Angeles plan come within permissible constitutional and statutory limits?"

E. TITLE VII CONCLUSIONS

If the court applied the intent standard enunciated in *Scott v. City of Anniston, supra,* there is no evidence of an intent to discriminate, and the Title VII claim must fail. Assuming that the Ninth Circuit or the Supreme Court decides that the *Duke Power Co.* impact standard applies to state and local governments, the Title VII claim would still fail. The undisputed facts before this court are such that the court must conclude as a matter of law that the qualifying tests are appropriate for the selection of qualified applicants for the job in question. The situation here is similar to that in *Washington v. Davis, supra,* 426 U.S. at 245-46, where the Supreme Court stated that it was "untenable" that a verbal abilities test for a police officer position was improper, even if it excluded a large number of Negroes.

V. CUT-OFF SCORES

The plaintiffs claim that the cut-off scores which have been established with respect to the physical abilities test are discriminatory, because they exclude a significantly greater percentage of women. The contention is that the defendants have failed to set these scores at a level reasonably consistent with the normal job requirements. Plaintiffs admit, however, that a cut-off score, although discriminatory, is permissible if the test is job related or "validated". This was made clear in *Griggs v. Duke Power Co.*, where the Court said:

> "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any test used must measure the person for the job and not the person in the abstract." 401 U.S. 424, 436 (1971).

As noted earlier, the validity of these tests has been established by defendants' evidence. In addition, the tests were designed by professionals for the express purpose of testing applicants for the type of police work which is now being done in the Los Angeles area. Since the tests are job related, the setting of cut-off scores is a matter for the employer's judgment. Many factors may go into this decision, such as the

number of applicants available, the cost of failures in training and on the job, the critical nature of the job to be prformed, and the level of performance at which the employer desires employees to perform.

VI. POLICE ACADEMY

The plaintiffs challenge the program at the Los Angeles Police Academy on the ground that its physical training requirements are set so high that more females fail to meet them than males. A resolution of this issue involves the same considerations which we have previously discussed. The Academy's training program, insofar as it relates to physical performance, is closely related to the job requirements. Therefore, the statistical impact upon women is not relevant.

VII. PERSONNEL POLICIES

Plaintiffs have attacked the defendants' personnel policies as they relate to job assignments, pay grades, promotions, and pensions. This challenge is predicated upon the assumption that the employment policies of the defendants at the entry level or at other times during plaintiff's employment, have been impermissibly discriminatory. It is not contended that these policies, in and of themselves, contain provisions which create a disproportionate impact upon females. A finding that the employment policies of the defendants are in other respects proper is a complete response to this challenge.

VIII. NO AFFIRMATIVE ACTION REQUIRED

Plaintiffs have claimed that defendants' failure to take affirmative action constitutes unlawful discrimination. Plaintiffs contend that defendants should have accelerated hiring and promotion of women to remedy the effects of past discrimination.

Like some of the other contentions made by the plaintiffs, this charge assumes past illegal discrimination in hiring and promotions. In light of this court's finding that the evidence in the record before us fails to establish any prior illegal discriminatory practices in hiring and promotions, defendants are entitled to summary judgment on this issue.

IX. VETERAN'S PREFERENCES

Although plaintiffs' complaint attacks the use of veteran's preferences in the defendants' employment practices, plaintiffs have since withdrawn that attack and the issue is no longer before this court.

X. CONCLUSION

The keystone of the plaintiffs' case is their contention that a woman can peform all the tasks involved in the performance of the job of Police Officer. Plaintiffs therefore conclude that the City must establish employment practices which will result in an equal proportion of male and female applicants being accepted as Police Officers. Assuming, arguendo, that women can perform all of these tasks to some degree, the fact remains that many men, because of their physical characteristics, can perform certain important functions better than a large majority of women. As the Supreme Court said in *Griggs v. Duke Power Co., supra* at 436:

> "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins."

There is nothing in Title VII which would require an employer to hire a qualified woman in preference to a more qualified man. Title VII was enacted to eliminate sex as a factor in the employment context, not to establish it as a primary consideration.

The City of Los Angeles has decided to establish a police force with certain characteristics that are related to the proper exercise of its police powers. The fact that proportionately more men than women possess the desired characteristics does not invalidate the City's decision, unless there is some discriminatory intent not shown here.

I find, therefore, that upon the record before this court there is no genuine issue as to any material fact to be litigated, and that the defendants are entitled to judgment as a matter of law.

Let summary judgment issue in favor of the defendants.

DATED: May 13, 1977

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

APPENDIX C.

Opinion.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellant, v. City of Los Angeles, et al., Defendants-Appellees. No. 77-3460.

Appeal from the United States District Court for the Central District of California.

Filed: May 2, 1979.

Before: HUFSTEDLER and TANG, Circuit Judges, and SOLOMON,* District Judge.

HUFSTEDLER, Circuit Judge:

The Government appeals from an order enjoining the United States from pursuing any administrative action or investigation regarding employment discrimination by the Los Angeles Police Department ("LAPD"), from terminating any funds to the City of Los Angeles ("City") because of personnel practices of the LAPD, and from failing to grant any request by the City for federal funding because of allegations of employment discrimination by the LAPD.[1] We hold

*Honorable Gus J. Solomon, Senior United States District Judge, District of Oregon, sitting by designation.

[1]The injunction reads as follows: "The federal Government, including all agencies and departments thereof, are hereby enjoined from pursuing or initiating administrative actions, reviews, or investigations pertaining to or arising from alleged employment discrimination relating to the Los Angeles Police Department; from terminating any federal funding to the City of Los Angeles or any department or agency thereof as a result of or arising out of any personnel practice(s) relating to the Los Angeles Police Department; and from using any allegations of employment discrimination relating to the Los Angeles Police Department as a reason to fail to grant or to otherwise disapprove the funding of federal grant programs for which the City applies."

that the City did not carry its burden of demonstrating facts entitling it to "preliminary relief" within the meaning of the Omnibus Crime Control and Safe Streets Act of 1968 ("Safe Streets Act," 42 U.S.C. § 3766(c)(2)(E)) because the City did not meet even the minimal standards for obtaining injunctive relief, and we vacate the injunction.

On June 2, 1977, the United States filed this action charging the LAPD with a pattern and practice of employment discrimination aganst blacks, women, and Spanish-surnamed persons. The complaint alleged violations of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*, as amended), the State and Local Fiscal Assistance Act of 1972 ("Revenue Sharing Act," 31 U.S.C. § 1242, as amended), and the Safe Streets Act. Pursuant to motions filed both by the City and the Government, the proceedings were stayed pending disposition of the appeal in *Blake v. City of Los Angeles* (C.D. Cal. 1977) 435 F. Supp. 55.[2]

I

"The United States, as sovereign, is immune from suit save as it consents to be sued [citations omitted], and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." (*United States v. Sherwood* (1941) 312 U.S. 584, 586; *United States v. Agnew* (9th Cir. 1970) 423 F.2d 513.) The United States does not waive its sovereign immunity by instituting the action in which a

[2]In Blake v. City of Los Angeles (C.D. Cal. 1977) 435 F. Supp. 55, the same district court awarded summary judgment to defendants in a private class action alleging sex discrimination by the LAPD in violation of Title VII and the Fourteenth Amendment. Today we reverse the district court's decision in *Blake, ante,* at ...., and remand for further proceedings.

defendant asserts a claim for affirmative relief against the United States. (*United States v. Eckford* (1867) 6 Wall. (73 U.S.) 484; *United States v. Mel's Lockers, Inc.* (10th Cir. 1965) 346 F.2d 168; *United States v. Patterson* (5th Cir. 1953) 206 F.2d 345. *See also Larson v. Domestic & Foreign Commerce Corp.* (1949) 337 U.S. 682, 703-04. 14 Wright-Miller-Cooper, Federal Practice and Procedure § 3654, pp. 156 *et seq.* (1976).)

Consent to suit in this case rests solely on the Safe Streets Act. Accordingly, we turn our attention to that statute to ascertain the jurisdictional predicate for the injunction as well as to determine the applicable standards which govern the grant of the injunction.

II

The Safe Streets Act require the Law Enforcement Assistance Administration ("LEAA") to suspend payment of funds to the LAPD 45 days after filing this action unless the district court correctly granted "preliminary relief." (42 U.S.C. § 3766(c)(2)(E).) Defendants seeking to enjoin automatic suspension of LEAA funds under the statute must meet the normal standards for obtaining injunctive relief, absent explicit provisions to the contrary in the statute. (*United States v. Commonwealth of Virginia* (4th Cir. 1978) 569 F.2d 1300.)

The City contends that Section 518(b) of the Safe Streets Act (42 U.S.C. § 3766(b)) required the district court to issue an injunction restraining LEAA from cutting off the funding. That section provides that the Act shall not authorize LEAA "to deny or discontinue a grant" because of a refusal to adopt "a percentage ratio, quota system, or other program to achieve

racial balance or to eliminate racial imbalance in any law enforcement agency."[3] The City's theory is that the reason the Government brought this suit was the refusal of the LAPD to adopt a quota system for police hiring proposed by LEAA. In support of its contention, the City refers to facts recited in affidavits accompanying its petition for injunctive relief that this action was filed only after LAPD had refused to adopt a voluntary compliance agreement setting "goals" and "time tables" for increasing the percentage of blacks, women, and Spanish-surnamed persons employed by the LAPD.

Even if we assume, *arguendo*, that the "goals" and "time tables" proposed by LEAA constitute a "quota system," it was not a system forbidden by Section 518(b) because there is no evidence that the system was part of a "program to achieve racial balance" within the meaning of the statute. The phrase "program to achieve racial balance" is a term of art referring to attempts to remedy racial disparities that were not produced by discrimination. (*Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1, 17-18.)[4] A "quota system" directed toward alleviating

---

[3]42 U.S.C. § 3766(b) provides: "Notwithstanding any other provision of law nothing contained in this chapter shall be construed to authorize the Administration [LEAA] (1) to require, or condition the availability or amount of a grant upon, the adoption by an applicant or grantee under this chapter of a percentage ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency, or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this chapter to adopt such a ratio, system, or other program."

[4]Since Congress has re-enacted Section 518(b) twice since the *Swann* decision, it is reasonable to conclude that Congress was aware of the legal significance of the "racial balance" language. (*See* Drummond v. Acree (1972) 409 U.S. 1228 (Powell, Circuit Justice, on reapplication for stay).)

gender-based discrimination is obviously outside the purview of efforts "to achieve a racial balance." Of greater moment, however, there is nothing in the record to suggest that the federal Government sought to remedy racial disparities not created by unlawful discrimination. The prospective suspension of LEAA funds was the product of a lawsuit alleging a pattern or practice of unlawful discrimination. It is undisputed that one of the reasons that negotiations between LEAA and the City collapsed was the City's refusal to abandon the use of its physical tests, height requirement, and written tests for the selection of police officers. This refusal can hardly be called a refusal to adopt a "quota system." Moreover, in the companion case, *Blake v. City of Los Angeles* (9th Cir. 1979) ..... F.2d ....., we hold that the physical test and height requirement are prima facie violations of Title VII that must be justified by a showing of business necessity.[5]

To sustain the granting of the preliminary injunction, the burden was on the City to demonstrate either probable success on the merits and the possibility of irreparable harm, or serious questions going to the merits and a balance of hardships tipping sharply in its favor. (*William Inglis & Sons Baking Co. v. ITT Continental Baking Co.* (9th Cir. 1975) 526 F.2d 86.) The district court did not make any separate findings of fact and conclusions of law to support the issuance of the injunction. The basis for the district court's decision appears in the court's Memorandum Opinion: "In order to maintain the status quo and to prevent irreparable injury to the law enforcement plans and programs of the Police Department of the

[5]The district court made no finding relevant in any respect to this issue.

City of Los Angeles pending the outcome of this litigation, the injunction as prayed for should likewise be granted." The court also stated, citing its opinion in *Blake v. City of Los Angeles* (C.D. Cal. 1977) 435 F. Supp. 55, "[i]t does not appear . . . that the plaintiff's ultimate success in this case is probable." Because we have reversed *Blake*, the district court's prediction of the City's probable success on the merits is erroneous.[6]

The record failed to demonstrate that LAPD would suffer any irreparable injury in the absence of an injunction. To be sure, the City faced prospective suspension of LEAA funding to the LAPD. As a matter of law, the loss of this funding cannot be deemed irreparable injury in the absence of a more convincing showing than that made by the City here.[7] Congress deliberately imposed an automatic suspension of funding to achieve the purposes of the legislation by creating an additional incentive for compliance with the non-discrimination provisions of the Safe Streets Act. Actions undertaken by the Attorney General, as in this case, or by other administrative agencies charged with the responsibility to enforce the provisions of the Safe Streets Act, the Revenue Sharing Act, and Title VII cannot be enjoined simply because those actions may require recipients of congressional largesse to expend large amounts of

[6]The City argues that, *Blake* aside, it will ultimately prevail on the merits because of claimed jurisdictional deficiencies in the Government's lawsuit. It is unnecessary for us to reach any of these contentions for two reasons: First, jurisdiction was adequately founded on the non-discrimination provisions of the Safe Streets Act (42 U.S.C. § 3766(c)), and second, the district court did not address any of these contentions in granting the injunction.

[7]Affidavits submitted by the City indicate that the primary effect of a loss of these funds would be the reassignment of certain officers participating in a program to control street gangs.

time and taxpayers' resources. (*See Renegotiation Board v. Bannercraft Clothing Co.* (1974) 415 U.S. 1, 24 ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *cf. City of Milwaukee v. Saxbe* (7th Cir. 1976) 546 F.2d 693.)

Finally, an order enjoining the suspension of LEAA funds cannot be justified on the grounds that it was necessary "to maintain the status quo." Congress has directed that the status quo cannot be maintained following the filing of a "pattern or practice" complaint by the Attorney General under the Safe Streets Act. It would defeat the purpose of the automatic fund suspension provision of Section 3766(c)(2)(E) to enjoin the suspension of such funds to maintain the status quo that the statute was designed to disrupt. (*See, e.g., United States v. County of Milwaukee (E.D. Wis.* 1978) 449 F. Supp. 949, 951.)[8]

On remand, the district court should reconsider the United States' request for preliminary relief under the standards outlined in this opinion and in *Blake v. City of Los Angeles, ante* at .....

The injunction is vacated and the cause is remanded to the district court for further proceedings consistent with the views herein expressed.

---

[8]The City has conceded on appeal that the injunction is indefensibly overbroad. Neither the Safe Streets Act nor any other relevant statute provides consent of the United States to jurisdiction pursuant to which the district court could enjoin the federal government and all of its agencies and departments "from pursuing or initiating administrative actions, reviews, or investigations pertaining to or arising from alleged employment discrimination relating to the Los Angeles Police Department," or from "using any allegations of employment discrimination relating to the Los Angeles Police Department as a reason to fail to grant or to otherwise disapprove the funding of federal grant programs for which the City applies."

APPENDIX D.

Memorandum.

United States District Court, Central District of California.

United States of America, Plaintiff, v. City of Los Angeles, etc., et al., Defendants. No. CV 77-1986-JWC.

Filed: July 13, 1977.

The defendants have moved to stay all proceedings in this case pending a final determination of the appeal in *Blake v. City of Los Angeles, et al.*, No. CV 73-1962-JWC, recently decided by this court. Defendants have also moved for an injunction to enjoin the government from acting through any of its agencies to terminate federal funding to the City of Los Angeles because of any personnel practices used by the Los Angeles Police Department.

The government agrees that a stay of these proceedings is proper insofar as it relates to discrimination based upon sex. However, the government urges that discovery in this case should go forward on the issue of discrimination based upon race, not raised in *Blake*. Then if the *Blake* decision is reversed and the case remanded for trial, the *Blake* case and this case can be tried together.

In *Blake*, this court held, *inter alia*, that the usual Title VII standards for determining whether employment practices are permissible cannot constitutionally be applied to state agencies. If that holding is sustained on appeal, any extensive discovery such as plaintiff would be likely to carry out in this case would be irrelevant. It is therefore this court's opinion that until

some definitive ruling is made by some higher court on this issue, this court would be at a loss to know how to direct discovery. In an effort to avoid the vast amount of discovery such as was done in *Blake,* most of which was unnecessary under the court's ruling, the defendants' request for a stay should be granted.

In order to maintain the status quo and to prevent irreparable injury to the law enforcement plans and programs of the Police Department of the City of Los Angeles pending the outcome of this litigation, the injunction as prayed for should likewise be granted.

The plaintiff has moved to enjoin the City of Los Angeles from further hiring of persons for the position of police officer by the Los Angeles Police Department, pending trial of this case on its merits. In my view, such an injunction would be unwise for the following reasons:

1. Federal interference with a municipality in the performance of a governmental function is always a matter of great concern and should be avoided except where some mandate of the United States Constitution is clear and definite.

2. In light of the court's decision in *Blake,* there is no constitutional mandate to justify such an injunction. It does not appear to this court that the plaintiff's ultimate success in this case is probable.

3. Since it may be many months, or perhaps even years, before the issues raised by *Blake* are finally determined, there will consequently be some considerable time before this case can be brought to judgment. An injunction such as plaintiff requests would cripple the Los Angeles Police Department, perhaps tragically, in its efforts to carry out a most important governmental function.

4. In the event the plaintiff should ultimately succeed, any racial or sexual discrimination which the court then finds impermissible, can in large measure be compensated for by such affirmative relief as the court may then see fit to order.

For these reasons, plaintiff's request for preliminary injunction is denied.

DATED: July 13, 1977

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

APPENDIX E.

Order Regarding Motion to Stay Proceedings and to Enjoin Fund Cutoffs.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. City of Los Angeles, etc., et al., Defendants. Civil Action No. 77-1986-JWC.

Filed: July 13, 1977.

Defendants have moved for an Order to stay the instant action and for an injunction enjoining the Federal Government, its agencies and departments from terminating any federal funds received by the City of Los Angeles. Plaintiff opposes the motion. After having considered the moving papers and opposition thereto, points and authorities, affidavits and memorandum in support of and in opposition to the motion, and oral argument,

IT IS SO ORDERED that:

1. The instant action, *United States of America v. City of Los Angeles, etc., et al.,* Civil Action No. 77-1986-JWC be stayed until such time as any appeals of the Court's judgment in *Blake v. City of Los Angeles,* Civil Action No. 73-1962-JWC have been exhausted; and that,
2. The federal Government, including all agencies and departments thereof, are hereby enjoined from pursuing on initiating administrative actions, reviews, or investigations pertaining to or arising from alleged employment discrimination relating to the Los Angeles Police Depart-

ment; from terminating any federal funding to the City of Los Angeles or any department or agency thereof as a result of or arising out of any personnel practice(s) relating to the Los Angeles Police Department; and from using any allegations of employment discrimination relating to the Los Angeles Police Department as a reason to fail to grant or to otherwise disapprove the funding of federal grant programs for which the City applies.

SO ORDERED this 13 day of July 1977, at Los Angeles, California.

/s/ Jesse W. Curtis
UNITED STATES DISTRICT COURT JUDGE

Presented by:
BURT PINES, City Attorney
JOHN B. RICE, Senior Assistant City Attorney
CECIL W. MARR, Deputy City Attorney
ROBERT J. LOEW, Deputy City Attorney

By /s/ Cecil W. Marr
CECIL W. MARR
Attorneys for Defendants.

APPENDIX F.

Pertinent Constitutional Provisions.

Tenth Amendment.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment, Sections 1 and 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX G.

Sections 703(a) and (h) of Title VII of the 1964 Civil Rights Act, as Amended.

SEC. 703.(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results

is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

APPENDIX H.

Sections 518(a), (b), (c)(1) and (c)(2)(E) of the Omnibus Crime Control and Safe Streets Act of 1968, as Amended.

Sec. 518. (a) Nothing contained in this title or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any police force or any other law enforcement agency of any State or any political subdivision thereof.

(b) Notwithstanding any other provision of law nothing contained in this title shall be construed to authorize the Administration (1) to require, or condition the availability or amount of a grant upon, the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency, or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program.

* * *

(c)(1) No person in any State shall on the ground of race, color, religion, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under or denied employment in connection with any program or activity funded in whole or in part with funds made available under this title.

* * *

(c)(2)(E) Whenever the Attorney General files a civil action alleging a pattern or practice of discriminatory conduct on the basis of race, color, religion, na-

tional origin, or sex in any program or activity of State government or unit of local government which State government or unit of local government receives funds made available under this title, and the conduct allegedly violates the provisions of this section and neither party within forty-five days after such filing has been granted such preliminary relief with regard to the suspension or payment of funds as may be otherwise available by law, the Administration shall suspend further payment of any funds under this title to that specific program or activity alleged by the Attorney General to be in violation of the provisions of this subsection until such time as the court orders resumption of payment.